DOCUMENT RESUME

ED 251 891 EA 016 603

AUTHOR	Piele, Philip K., Ed.
TITLE	The Yearbook of School Law, 1983.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE	83
NOTE	347p.; For individual chapters, see EA 016 604-611.
AVAILABLE FROM	Publications, National Organization on Legal Problems of Education, Southwest Plaza Building, 3601 W. 29th, Suite 223, Topeka, KS 66614 ($25.95 plus $1.50 postage and handling, prepaid).
PUB TYPE	Books (010) -- Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Board of Education Policy; Collective Bargaining; Constitutional Law; Desegregation Litigation; Educational Administration; Educational Facilities; Educational Finance; Elementary Secondary Education; Employment Practices; Equal Education; *Federal Courts; *Governance; *Government School Relationship; Higher Education; Labor Problems; Legal Problems; Legal Responsibility; Private Schools; Public Schools; Resource Allocation; School Closing; School Districts; *School Law; School Taxes; State Boards of Education; *State Courts; Student Rights; Teacher Employment; Torts

ABSTRACT

This comprehensive reference reviews court decisions affecting the operation, management, and governance of public schools. This edition analyzes all public school cases decided during the 1982 calendar years and reported in West's Regional, Federal, and Supreme Court Resports, through the December 1982 advance sheets. Included as well are 1981 cases not reported in last year's edition; however, only significant higher education cases reported last year are included. The book's chapters are "Governance" by Thomas N. Jones; "Employees" by Joseph C. Beckham; "Bargaining" by Delbert K. Clear; "Pupils" by Henry S. Lufler, Jr.; "Torts" by Paul W. Thurston; "Finance" by Richard A. and Daniel M. Rossmiller; "Property" by Steven M. Goldblatt and Philip K. Piele; and "Higher Education" by Robert M. Hendrickson. A table of cases and an index are appended. (MJL)

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THE YEARBOOK OF SCHOOL LAW 1983

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Library of Congress Catalog Card Number: 52-2403

PRINTED IN U.S.A.

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PREFACE

In its twelfth year of publication by the National Organization on Legal Problems of Education, *The Yearbook of School Law* provides attorneys, administrators, school board members, and professors with a comprehensive review and advocacy-free analysis of the previous year's court decisions affecting the operation, management, and governance of public elementary and secondary schools and institutions of higher education in the United States.

The 1983 *Yearbook of School Law* includes *all* cases relevant to public schools decided during the 1982 calendar year and reported in West's Regional, Federal, and Supreme Court Reports—through the December 1982 advance sheets, as well as 1981 cases not reported in the 1982 *Yearbook*. However, only *significant* higher education cases reported last year are included.

Publication of the *Yearbook* continues to reflect the combined efforts of several hardworking and talented people: the ten authors who exhibited outstanding writing skill and subject expertise in preparing their chapters, and Darel Semler, NOLPE director of services and an attorney, whom with consummate skill, supervised production of the *Yearbook* and assisted with proofreading and case citation verification.

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GOVERNANCE

Thomas N. Jones

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1.0 INTRODUCTION

Administrators, teaching personnel, and school board members have an affirmative obligation to comprehend their legal duties and rights in the school environment. This chapter will address decisional law handed down during 1982 in the general area of school board governance. More specifically, topics which will be covered include the powers of the state board of education, powers and duties of local boards, open meeting laws, conflicts of interest in the school setting, school board elections, school district organization, and the legal issues of student transportation.

1.1 STATE BOARDS OF EDUCATION AND OTHER GOVERNMENTAL AGENCIES: SHARING THE AUTHORITY TO EDUCATE

A state board of education is either appointed by the governor or is elected either on a partisan or nonpartisan basis. The following cases examine the legal basis and duties of the state board and the state commissioner of education. The scope and extent of powers of the state board and state commissioner varies from state to state.

1.1a State Commissioners of Education

In a South Dakota case, judicial review was sought on a decision by the state superintendent of elementary and secondary education in a proceeding involving a minor school district boundary change. The state superintendent heard the appeal, conducted a full due process hearing and approved the transfer.

The Supreme Court of South Dakota held that neither the circuit court nor the supreme court may substitute its individual judgment for that of the state superintendent in resolving school district boundary disputes.[1] The court added that the record supported the decision of the superintendent in approving the boundary change, with applicants more closely aligned to economic, social and religious life of the transferee community and with the financial effect on transferor being negligible. Therefore, the state superintendent's decision was neither contrary to law, clearly erroneous, arbitrary, capricious, nor an abuse of discretion.

In an Article 78 proceeding from New York, the school board of New York City sought review of three substantive determinations of the commissioner of education and of the commissioner's decision denying the board's application to reconsider the three determinations, all of which concerned the tenure and seniority rights of six teachers.

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[1] Shumaker v. Canova School Dist., 322 N.W.2d 869 (S.D. 1982).

The state supreme court held that an Article 78 proceeding seeking to annul determinations of the commissioner relating to faculty tenure rights was barred by the school district's failure to commence the proceedings within the required period of four months after the determinations became final.[2] The court added that the discretionary power of the commissioner to rehear or reopen administrative determinations does not render an otherwise final order nonfinal.

The power of the state commissioner of education was litigated in another case from New York. A parent sought to annul a determination of the commissioner in finding his daughter ineligible for transportation to school. The court held that although the parent was entitled to review the determination of the commissioner, the sole issue on appeal was whether the commissioner's determination was arbitrary and capricious. The court concluded that in applying the proper standard, it could not be said that the commissioner's decisions was without rational basis.[3]

1.1b State Boards of Education

In a case arising from California, the community of Yorba Linda has its own elementary school district, but is part of the Fullerton Joint Union High School District. The state board of education approved a plan to create a new Yorba Linda Unified School District and transfer responsibility for high school education of Yorba Linda students from the Fullerton High School District to the new district. The state board directed that the proposal be submitted for approval in an election limited to the residents of Yorba Linda.

Fullerton High School District petitioned to prevent the election. The trial court upheld portions of the state board's decision, but held invalid the limitation of the franchise to Yorba Linda residents, and accordingly barred the election. Both parties appealed.

The Supreme Court of California held that the state board's decision to limit the vote to residents in Yorba Linda unconstitutionally infringed upon the voting rights of residents in the existing district since they had substantial interests in the election because it would have racial and financial impact on that district and could seriously affect the quality of education offered by the existing district.[4]

The denial by the Wyoming State Board of Education of an application for certification as a school district superintendent was upheld by the Wyoming Supreme Court.[5] The applicant clearly failed to meet certain education and experience requirements established by the board's certification regulations, and the board had denied his request for an exception to the requirements. Upon the applicant's petition to the district court for review of the board's action, the court had ordered the issuance of the certification.

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[2] City School Dist. v. Ambach, 446 N.Y.S.2d 571 (N.Y. App. Div. 1982).

[3] Gundrum v. Ambach, 433 N.E.2d 531 (N.Y. 1982).

[4] Fullerton Joint Union High School Dist. v. State Bd. of Educ., 651 P.2d 168 (Cal. 1982).

The first issue decided by the supreme court was whether the power to make final decisions on certification applications was vested in the state board or in the state superintendent. The authority of the board had not been challenged, but the court chose to answer the question, in light of the pendency of a federal court case involving the same facts. As a matter of statutory construction the court ruled that the board was the final arbiter of such decisions, subject of course to judicial review of the administrative action.

The applicant's principal constitutional claim was that he had been denied due process of law since no member of the state board had been present at the three-day hearing held before a board-hired hearing examiner, who was a law professor from the University of Wyoming, and that the hearing examiner was not an employee of the agency as required by statute. The supreme court ruled that by entering into a contract for service with the board, the professor became an employee. The court stated:

> Here, the record reflects that at the time appellee requested a hearing the members of the State Board of Education had had substantial contact with the case, and in order to insure a full measure of fairness, they appointed an independent hearing officer to conduct the hearing. The record also reflects that the hearing was conducted openly and fairly with each party being permitted to introduce evidence and to conduct direct examination and cross-examination. . . . Finally, the record plainly supports the fact that the Board met and carefully apprised itself of the contents of the hearing record before rendering its decision. We therefore conclude that the (applicant) has been afforded his due process rights in full measure.

Finally, the court found that the state board's decision was supporte by substantial evidence, which it defined as relevant evidence that reasonable mind might accept as supporting the agency's conclusion.

The power of the state board in an annexation case was litigate recently in North Dakota. The local school district appealed the dec sion of the state board of education in granting petitions and approvi annexation of certain lands lying within the school district to another school district.

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[5] Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681 (Wyo. 1982).

The Supreme Court of North Dakota held that the state board's finding that annexation was an acceptable part of a comprehensive plan for reorganization of school districts was supported by the preponderance of evidence and was in accordance with state statute.[6]

1.2 POWERS AND DUTIES OF SCHOOL BOARDS

1.2a General Powers

As a general rule, the judiciary will not interfere with the discretionary powers of boards of education unless the board's activities are arbitrary, capricious, or illegal. The source of power of a local school board stems from either the state constitution, the state legislature, or the state board of education.

In a recent Minnesota case, a board of education after much study of the factual situation and future probabilities took action to realign students among several buildings in the district. This involved transferring senior high school students from one senior high to another senior high building and converting the first mentioned building to all junior high use. One public meeting was held to give public input with the formal decision made later. Unhappy citizens and organizations undertook certiorari review of the board's decision. The trial court found the board failed to provide a timely and procedurally adequate hearing required by statute and that its closure decision was arbitrary, capricious, and unreasonable.

The board appealed to the state supreme court which held realignment of students among buildings and use of a building for education of students of a different grade level did not constitute "closing that school." Also, it was held that the board had authority to realign students and that neither the trial court or the supreme court had authority to substitute their decision for the decision made by the board. The supreme court reversed with instructions to vacate the permanent injunction.[7]

In a Louisiana case, the plaintiff, Stannard Broadcasting Company, was the owner and operator of radio station KVVP, located in Leesville, Louisiana. It filed suit against the Vernon Parish School Board and radio station KLLA in Leesville to annul the action of the official broadcaster for Leesville High School football games during the 1981-1982 season, and further to enjoin station KLLA from using the room on the end of the press box at the school stadium.

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[6] Edmore Pub. School Dist. v. State Bd., 326 N.W.2d 81 (N.D. 1983).

[7] Westers Area Bus. and Civic Club v. Duluth School Bd. Indep. Dist., 324 N.W.2d 361 (Minn. 1982).

On appeal, plaintiff stated there were three issues: (1) Does a school board have the authority to name an "official broadcaster for high school football games?" (2) If they do have this authority, should the Vernon Parish School Board have been estopped from taking such action which would go into effect for the 1981-1982 school year? (3) Did the actions of the school board in instructing the superintendent to notify the principal with regard to the use of the official press room violate the Louisiana Open Meeting Laws?

In its brief filed with the court, plaintiff conceded that the action may be moot since the 1981-1982 football season had been completed at time of appeal. However, plaintiff requested that the court decide the issue raised above.

The state court of appeals, in finding the present case moot, ruled that an established rule of Louisiana jurisprudence is that courts will not rule upon questions which have become moot. No judgment which the court could render could give the plaintiff the relief it sought.[8]

In an action from Pennsylvania based on theories that lights on the high school athletic field would be a public nuisance and that the school board abused its discretionary powers in granting permission for the erection of the lights, the trial court, after having concluded that no nuisance would occur if the proposed erection of lights were to take place, held that it lacked any equitable basis for reversing the actions of the school board regarding the use of the lights.[9]

It is undisputed that in most states only the school board can employ and terminate personnel. A recent decision addressed the board's authority in teacher termination cases. A Maine court ruled that a teaching job is not "property" subject to the fourteenth amendment's due process requirements under state law, that boards cannot make their hiring authority subject to grievance arbitration, and that they need only consider what is best for the schools when deciding which teachers should be laid off.

The Maine Supreme Judicial Court overturned a superior court ruling that the school board could not terminate a teacher under a continuing contract while retaining a probationary teacher to do approximately the same work.[10]

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[8] Stannard Broadcasting Co. v. Vernon Parish School Bd., 422 So. 2d 591 (La. Ct. App. 1982).

[9] Board of School Dirs. v. Kassab, 450 A.2d 282 (Pa. Commw. Ct. 1982).

[10] Paradis v. School Admin. Dist. No. 33, 446 A.2d 46 (Me. 1982).

1.2b Delegation of Authority

The exclusive power of the school board to bind a district to a contract was litigated in a North Carolina case. Community Projects for Students, Inc. is a corporation in the business of selling various products which schools may use for fund-raising activities. In this case, the corporation sought to recover money due as the result of selling $4,106.40 worth of decorative oil lamps to a high school music teacher who wished to raise money for the school choir. The music teacher personally signed the sales contract, but there was no official or unofficial school board action taken regarding this matter.

The state court of appeals held that local school boards alone have the duty and authority to enter into or authorize purchases of supplies and equipment for their respective local school systems. The court held that there was no evidence tending to show that any contract was entered into between the corporation and the school board. Therefore, the corporation could not maintain its action against the board on the theory of the music teacher's express or implied authority to obligate the school board.[11]

1.2c Authority to Provide Instruction

A mandamus action was brought by parents against a Michigan board of education seeking continuation of a driver education program in the school district. In reviewing relevant state laws, the court of appeals ruled that the statute which provides that driver education courses shall be conducted by local public school districts controlled previously enacted general grant of power in school code giving local boards of education discretion to establish curricula that they deemed desirable and thus removed discretion from the school board and required it to offer driver education courses to eligible students.[12]

The Supreme Court of Alabama addressed the issue of the board's authority to provide day care centers for area students. The Jefferson County Board of Education offers child care services as an adjunct to its regular academic program. The child care services are offered under the auspices of the Community Education Department of the board, and while the scope and nature of the child care programs offered by the board vary somewhat from zone to zone, in accordance with the needs and desires of the local community, the basic child care services include supervision of recreational activities, including physical activity, feeding of a snack, assistance with homework, and, when requested, special tutorial programs coordinated with regular school work.

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[11] Community Projects for Students, Inc. v. Wilder, 298 S.E.2d 434 (N.C. Ct. App. 1982).

[12] Sharp v. Huron Valley Bd. of Educ., 314 N.W.2d 785 (Mich. Ct. App. 1982).

Participation in these programs is voluntary and on a fee basis. The community education program of the board and the child care program, in particular, are "self-sufficient" in that all expenses are met by fees generated from the programs. All programs are conducted within existing school facilities.

The private owners of competing day care centers filed suit against the board and sought an injunction to prohibit the board from operating such centers. The plaintiffs claimed that the board was not empowerd to operate day care centers.

In holding for the board, the state supreme court ruled that the local board of education had authority conferred by statute and under authority to operate such day care centers.[13]

The procedural issue of standing was litigated in a Pennsylvania case concerning the board's duty to provide a certain number of days of instruction. From September 3 through September 24, 1980, members of the Upper Bucks County Vocational-Technical School Education Association engaged in a lawful strike of the school which resulted in the loss of sixteen instruction days.

Following the strike, the school board, which had inititally adopted a school calendar providing for 180 half days of instruction, adopted a new calendar for the 1980-1981 school year which provided for only 164 half days of instruction. The association, believing that this shortening of the school year was in violation of the terms of the board's policies and state statutes, joined with the individual plaintiffs in filing an action for declaratory judgment.

The lower court concluded that the association and individual plaintiffs lacked standing to challenge the shortened school year. The state appellate court, in reversing the lower court decision, stated that the fact that a plaintiff will be generally adversely affected does not in itself put a plaintiff in the class authorized to seek a declaratory judgment. Instead, a plaintiff must establish an interest which must be more than a general interst, and must have a direct, substantial and present interest, as contrasted with a remote or speculative interest. In this case, the court concluded that the association and individual taxpayers had standing to seek a declaratory judgment challenging the board's decision to shorten the school year. The fiscal impact that shortening the school year would have on taxpayers supplied the necessary "direct interest" between the plaintiffs and their right to bring suit.[14]

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[13] Clark v. Jefferson Cty. Bd. of Educ., 410 So. 2d 23 (Ala. 1982).

[14] Upper Bucks Cty. Voc.-Tech. School Educ. Ass'n v. Upper Bucks Cty. Area Voc.-Tech. School Joint Comm., 450 A.2d 295 (Pa. Commw. Ct. 1982).

1.2d Power to Contract

In most jurisdictions, school boards are quasi-municipalities and have the same power as does a municipal corporation. Therefore, boards are vested with the power to sue, be sued, and to enter into valid, enforceable contracts.

On April 22, 1980, a school board in Tennessee issued an "Invitation to Bid" on a contract to furnish 136 typewriters for use in the Metropolitan Nashville schools. Seven sealed bids were publicly opened on May 6, 1980. The low bidder was Farrar Business Machines which offered to furnish Optima typewriters for the total sum of $18,534. Capitol, the next lowest bidder, submitted an offer to furnish Remington typewriters for the total sum of $20,584.40.

The bids were evaluated by the Metropolitan Coordinator of Business Education to determine if the lowest bid met the specifications. After her evaluation she determined that Farrar's typewriters did not meet specifications and recommended that its bid be rejected by the board. The board then awarded the contract to Capitol, the next lowest bidder.

On May 30, 1980, the board mailed five purchase orders to Capitol. Thereafter a representative from Farrar met with the purchasing agent for the board and, after this meeting, he concluded that a mistake had been made and that the Optima machines which Farrar had purported to supply did meet specifications. On June 10, 1980, the board officially voted to rescind its contract with Capitol and to accept the bid of Farrar Business Machines. Capitol's suit against the board for breach of contract then ensued.

After a bench trial, the chancellor found that the board lacked authority to enter into a contract with the second lowest bidder. He found that the board is bound to award contracts to parties submitting the lowest bid and to do otherwise is an invalid exercise of authority. He concluded that the contract between Capitol and the board was ultra vires and unenforceable and dismissed Capitol's complaint.

The Tennessee Court of Appeals, in reversing the chancellor, held that the section of the Metropolitan Code providing that contracts will be awarded only to parties making lowest competent and responsible bids and the section of metropolitan charter providing for rejection of any and all bids, gave authority to the board of education to award contracts to furnish typewriters for use in schools to second lowest bidder. Therefore, the plaintiff bidder was entitled to recovery of anticipated profits.[15]

Capitol City Office Machs. v. Metropolitan Bd. of Educ., 632 S.W.2d 142 (Tenn. Ct. App. 1982).

The issue of school board authority to contract for public utilities was presented in an Ohio case. The court held that contracting for public utilities services is exclusively a municipal function under the Ohio Constitution. The state supreme court ruled that the board of education could not contract for public utility services without the express consent of the surrounding municipality, where such contract would substantially interfere with the power of the city to control public utilities which served its inhabitants.[16]

1.3 THE RIGHT OF THE SCHOOL BOARD TO ESTABLISH POLICY

The Michigan Court of Appeals in examining a case involving residency requirements stated that although school districts have policies discouraging students from living with persons other than their parents or legal guardians, these policies are aimed at preventing children from living away from their parents and enrolling in school districts strictly for educational reasons.

The court ruled that when the child's parents live outside the school district or are unable to care for the child and the parents have chosen to place the child with relatives within the district, the district may examine each case individually and accept the parent's signatures on forms attesting to the fact that the child's residence in that district with persons other than his or her parents is not solely for the purpose of enrolling the child in school in that district.[17]

In Louisiana, an association of educators and others brought an action against the school board alleging that the board violated its own written policies and rules when it employed a Dr. Lucas as coordinator of federal funds. Plaintiffs argued that in hiring Lucas without advertising the position and without developing a job description was in contradiction of several board policies. Plaintiffs claimed they were entitled to relief either through writs of quo warranto, mandamus, and/or mandatory injunction.

The state appellate court, in holding for the school board, ruled that: (1) plaintiffs failed to state a cause of action upon mandamus in absence of an allegation that the school board had a statutory duty to follow a set procedure in hiring its personnel; (2) plaintiff's failed to state a cause of action upon quo warranto in the absence of an allegation that the plaintiffs were claimants to the petition in question; and (3) plaintiffs failed to perfect a case upon injunctive relief absent an allegation of specific facts from which it could be concluded that they would face irreparable harm absent a granting of an injunction.[18]

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[16] Village of Lucas v. Lucas Local School Dist., 442 N.E.2d 449 (Ohio 1982).

[17] *In re* Curry, 318 N.W.2d 567 (Mich. Ct. App. 1982).

School board policies were attacked on first amendment grounds in two cases during the last year. In an Alabama case, four policies of the board, two relating to the distribution of literature on school campuses to students and faculty, and two relating to visitors on the school campus, were challenged based on the right to free speech.

The two policies regulating literature distribution provided that all material, political or sectarian in nature, distributed on any school site must have prior approval of the assistant superintendent of administration. The policies regarding school visitors provided in pertinent part that all visitors must report directly to the school office and final authority concerning visitation to the local school resides with the building principal or his responsible designee.

The controversy in this case arose out of a dispute over a teacher competency testing proposal favored by the school board, but strongly opposed by a group of teachers. The teachers brought suit challenging the constitutionality of the policies when the school administration disallowed the teachers' attempts to disseminate documents to fellow teachers, arrange meetings at the school, and to send speakers to such meetings.

The Fifth Circuit ruled that the policies concerning literature distribution to faculty members was unconstitutional both facially and as applied since they did not furnish sufficient guidelines to prohibit unbridled discretion on the part of the school board. The court noted that the policies were not ruled invalid because they required prior submission and prior approval of literature. Rather, the decision turned on the fact that as written, the policies did not furnish sufficient guidelines regarding the distribution of literature on school sites. The court added that the board can devise and implement policies permitting discretion needed to efficaciously operate the schools, while providing the clarity and procedures required by the first amendment.

The court further ruled that the two policies regulating visitors on school campuses were not facially unconstitutional for being overbroad or lacking sufficiently precise standards to guide school officials' discretion. These policies, applicable only to visitors from the outside, limit the school official's discretion to considerations of the safety, welfare, and education of the children.[19]

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18. Jackson v. Rapides Parish School Bd., 410 So. 2d 811 (La. Ct. App. 1982).
19. Hall v. Board of School Comm'rs of Mobile Cty., Ala., 681 F.2d 965 (5th Cir. 1982).

In a recent action from Louisiana, plaintiff filed suit against a school board seeking to enjoin the board from enforcing its rule prohibiting persons from bringing hand-held signs, regardless of content, into the school board meetings.

The Supreme Court of Louisiana held that communication by signs, placards or posters is closely akin to "pure speech" and is entitled to comprehensive protection under the free speech guarantees of the first amendment. However, the court pointed out that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.

The court stated that the school board policy providing that no sign which is carried by hand shall be permitted in the school board office building or in any of its rooms, leaves open ample alternative channels for communication of information contained on the signs, does not prevent the carrier from carrying the signs anywhere outside the school building, and does not deny access to the school board in violation of the first amendment.[20]

1.4 THE PUBLIC'S RIGHT TO KNOW: OPEN MEETING LAWS

1.4a Meetings

In most jurisdictions, school boards are allowed to go into executive session to discuss subjects specified in state statutes. Although all state laws vary to some degree, most states have held that the following topics may be discussed in closed session: student and personnel matters, collective bargaining strategy, discussion of the purchase of realty, and comments with the board's attorney regarding current litigation.

In Minnesota, members of the school board appealed from an order of the state district court finding that they had violated the open meeting law on two occasions.[21] The first occasion by a telephone conversation between the superintendent and a board member. The state supreme court, in reversing the lower court, held that the school superintendent, who was an ex officio member of the school board but not entitled to vote, was not a member of the "governing body" of the school district and therefore was not subject to the open meeting law and consequently the law was not violated. On the second occasion, the court held that a closed meeting of school board members to discuss labor negotiation strategies held at the request of the state mediator did not violate the open meeting law in that it was reasonable for the board to conclude that the mediator had impliedly authorized them to meet privately.[22]

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[20] Godwin v. East Baton Rouge Parish School Bd., 408 So. 2d 1214 (La. 1982).

[21] MINN. STAT. ANN. § 179.61 (1982).

In North Dakota, the school board held a closed executive session on March 17, 1980, to discuss school personnel. Danroth, the plaintiff teacher, was present at the beginning of the meeting but was asked to leave when the board went into closed session. At the closed session the board distributed teacher evaluations which were read and discussed; however, nonrenewals of teachers were not considered by the board at the closed meeting. The board, at a public meeting held on March 24, which was not attended by Danroth, considered and decided not to renew her contract and gave plaintiff notice of the contemplated nonrenewal by letter dated March 25, 1981.

The state supreme court held that nonrenewal had been determined as a result of a secret meeting held by the board and that the later open meeting was merely a pro forma ratification of discussions held at the secret meeting in violation of the open meeting law.[23] The court ruled that although the school board violated the open meeting law, the teacher was not entitled to be reinstated or to receive damages. The court stated that all that is required is for the board to reconsider its nonrenewal decision in open session.[24]

The definition of a school board meeting was the focal point in a recent Illinois decision. Plaintiff brought this action alleging violations of her civil rights by the seven individuals who comprise the local school board. Plaintiff alleged that she was excluded from a gathering at which all members of the school board were present and discussed school district business in violation of the open meeting law.[25] She contended that her exclusion from this gathering, which she characterized as a school board meeting, denied her constitutional rights of due process, equal protection, freedom of speech, freedom of association, and the right to petition the government.

The school board replied that the gathering in question was a political rally, that no discussion was held concerning school business, and that the parties charged, who were acting as private citizens, had a right to exclude the plaintiff.

The federal district court held that the fact that all members of the school board attended the political gathering and that issues of general public policy were discussed did not make the gathering a school board meeting. Therefore, the plaintiff was not entitled to attend the gathering under the open meeting law, and thus her constitutional rights were not offended when she was ejected from the gathering.[26]

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[22] Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982).

[23] N.D. CENT. CODE § 44-04-19 (1982). FED. R. CIV. P. 52(a) (1982).

[24] Danrogh v. Mandaree Pub. School Dist., 320 N.W.2d 780 (N.D. 1982).

[25] ILL. Smith-Hurd ANN. STAT. ch. 102, §§ 41, 41.02, 42 (1982).

1.4b Notice of Meetings

The issue of notice of school board meetings was litigated in a Massachusetts case. Plaintiffs, who were members of the teachers' union, appealed from a judgment declaring that provisions of the open meeting law were not applicable when the school board considered teacher layoffs based on budgetary constraints, and the board appealed from a ruling that it was required to reconvene in open session to ratify action taken in a properly held executive session.[27]

The appellate court held that the school board was authorized under the open meeting law to meet in executive session without sending notice to individual teachers when it was considering massive layoffs of teachers based on financial exigency. The court also ruled that the board was not required to reconvene to ratify its action concerning the layoffs, even though the purpose of meeting in executive session was related to litigation strategy to set the stage for a legal challenge of the job security clause of the collective bargaining agreement.[28]

In a case which will impact on the school setting, the Kansas Supreme Court sustained the constitutionality of the Kansas Open Meeting Act[29] in a case arising from the assessment of civil penalties against former county commissioners and hospital trustees in Thomas County. The facts of the case generally were that some of the public officials met twice with a hospital administrator in an adjacent county to discuss a possible management contract for the Thomas County Hospital. They also met once with an architect to discuss an energy conservation plan for the hospital. Although the commissioners had a practice of notifying the public of meetings, they did not notify anyone of the meeting called at the architect's request. Despite the fact that no member of the public had requested such notice before the first meeting, which was the basis of these convictions, the court upheld the convictions for that meeting.

The defendants argued unsuccessfully that their prosecution was improper because the Open Meeting Act was being selectively enforced, and that the act itself is unconstitutional because of the vagueness of the statutory description of the groups and the types of the meetings which must be open to the public and of which public notice must be given. The court rejected those arguments, as well as the argument that since the defendants did not intend to violate the law, they could not properly be found to have violated the act. The court stated the common rule that it is the intent to do a particular prohibited act and not the intent to commit a violation of the law, that is significant in criminal-type cases, including those under the Open Meeting Act, which provides for civil penalties.

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[26] Nabhani v. Coglianese, 552 F. Supp. 657 (E.D. Ill. 1982).

[27] MASS. GEN. LAWS ANN. ch. 39, §§ 23D (2), 23B (3) (West 1982).

[28] Doherty v. School Comm. of Boston, 436 N.E.2d 1223 (Mass. 1982).

[29] KAN. STAT. ANN. § 75-4317.

Although the dissent pointed out that no person had requested to be notified of meetings of the commissioners or the trustees before the time of the first meeting involved in this case, the Kansas Supreme Court apparently construed the act very broadly and read into it an affirmative duty to give some kind of public notice of any meeting, regardless of the existence of any requests for such notice, and in addition to such notice.[30]

1.4c Taping Meetings of the Board

Petitioners sought review of an order of the Polk County District Boundary Board denying their petition to have their real property transferred from the Perrydale School District to the Dallas School District.

After petitioners had filed their petition seeking a change in the school district boundary lines, and proper notice had been given, a hearing was held on September 21, 1981. At that meeting petitioner John Meser presented a written statement and oral testimony on behalf of all petitioners. The superintendent of the Perrydale School District appeared in opposition to the change. The board postponed its decision until its next meeting. At that meeting, on October 19, 1981, petitioners were informed that the board's tape recorder had not been working during the September meeting and that the only record of that meeting that was available was the minutes and the written statement submitted by petitioners. When asked if he had any objections to the minutes, Messer indicated that he did object because the minutes did not contain the testimony that had been given. The board proceeded, however, to adopt the minutes and then turned to the merits of the boundary change. On motion of one of its members, the board voted to deny the petition.

The petitioners argued that the discussion of the board was not supported by substantial evidence. The state appellate court, agreeing with the petitioners, held that the record before it did not contain substantial evidence to support the findings of the board. The minutes of the September meeting indicate only that the Perrydale superintendent made a statement in opposition to the petition. The testimony underlying the missing entry was apparently the basis of the board's finding.[31]

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[30] State *ex rel.* Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982).

1.4d Requests for Information

A case arose out of a Michigan school district's refusal to disclose the names of certain students suspended at a meeting of the board of education. On November 17, 1980, a special meeting of the River Valley Board of Education was held. The meeting was open to the public. At the request of the parents of six students, the board met in a closed session to discuss and consider the possible suspension of the six students. At the conclusion of the closed session the board reconvened in open session and adopted three resolutions suspending the six students from the school for alleged drug-related activities on school property. The students were not identified by name during the open session of the meeting, but were identified by their student numbers.

The Palladium Publishing Company, publisher of the local newspaper, requested the names of the students and the board denied the request. Palladium filed suit to declare that the board's actions were in violation of the Open Meetings Act.[32]

The lower court held that there is no constitutional right of the press as such involved, but that the Open Meetings Act interpreted in reference to the law as it now stands, requires the naming of a suspended or expelled student at the meeting and in the board's minutes when such student is expelled or suspended by action of a board of education.

The state appellate court agreed with the lower court that the constitutional claim of the plaintiff was without merit. The court stated that regarding the obtaining of public information, the press stands in exactly the same position as the public-at-large. The court ruled that in order for the board of education to act upon the suspension of a student, the minutes of the board meeting must contain the student's name. The facts cannot be hidden by using the student's idenfitication number.[33]

The District Court of Lyon County, Kansas denied the request of a teacher appealing the nonrenewal of his contract to put into evidence depositions of four members of the board of education. The issue involved the requirement of the Due Process Procedure Act,[34] which guarantees the teacher the right to a fair and impartial decision based on substantial evidence.

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[31] Messer v. Polk Cty. Dist. Boundary Bd., 646 P.2d 1369 (Or. Ct. App. 1982).

[32] MICH. COMP. LAWS § 15.261 (1970).

[33] The Palladium Publishing Co. v. River Valley School Dist., 321 N.W.2d 705 (Mich. Ct. App. 1982).

[34] KAN. STAT. ANN. § 72-5439(f).

The teacher had sought to enter into evidence the depositions, containing questions and answers about the factors considered by the board members as they made the decision to not renew the contract. The teacher alleged that, while there may be a presumption that administrative officials performing "quasi-judicial functions," such as deciding whether there is substantial evidence to justify nonrenewal, had considered the record and all other available evidence and arguments of counsel, the presumption is rebuttable by proper evidence. The teacher wanted limited inquiry into the nature and extent of the board's consideration of all available evidence.

The court held that it was improper for school teachers to inquire into the board's mental processes in reaching a decision to terminate their teaching contracts. It held that to permit inquiry, even limited inquiry, into the administrative body's consideration of the evidence would be to circumvent the mental process rule. The school board's request to exclude the depositions was granted.[35]

In a case from New Hampshire, plaintiffs, a teachers' association, filed a petition for injunctive relief seeking the right to inspect and copy minutes of all executive sessions of the school board since January, 1980. The lower court impounded the minutes and transferred the case directly to the state supreme court without ruling on the issue. The Supreme Court of New Hampshire held that the minutes must be made available for public access at any time.[36]

1.5 SCHOOL BOARDS AND CONFLICTS OF INTEREST

In Virginia, Kootz and Malcolm, who held administrative positions in the public school system, filed a bill for declaratory judgment seeking a determination as to whether, as members of the County Board of Supervisors, they were prohibited by the Conflicts of Interest Act[37] from voting on the appointment of members to the county school board.

Kootz was elected to the board in 1975 and was a principal in the school district. Malcolm was elected to the board in 1976 and was general supervisor of instruction for the school system.

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[35] Tolliver v. Board of Educ., No. 82-C-29 (Kan. Dist. Ct. Lyon Cty. 1982).

[36] Orford Teachers' Ass'n v. Watson, 451 A.2d 378 (N.H. 1982).

[37] VA. CODE § 2.1.

The Virginia Conflicts of Interest Act states in pertinent part that:

> Any officer of employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interests to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency.[38]

The Supreme Court of Virginia held that the Act which requires any officer or employee of a governmental agency to disqualify himself from voting or participating in consideration on any transaction in which he has a material financial interest prohibited members of the county board who held administrative positions in the county public school system from voting on the appointment of members to the county school board, since, as employees of the school board, they had a material financial interest in the appointment of school board members.[39]

1.6 SCHOOL DISTRICT AND BOARD MEMBERS ELECTION, APPOINTMENT, AND RECALL

1.6a Voting Irregularities

In Indiana, plaintiffs filed a petition to change method of selection of board of trustees of the Spring Valley School Corporation with the county clerk. The clerk certified to the board of trustees that 659 registered voters of the school district signed the petition and that a total of 3,153 registered voters resided within the boundaries of the school corporation. State statute mandates that the board must consider all proposed changes in the selection process of the board of trustees when twenty percent or more of the voters sign such a petition.[40]

The board adopted a resolution expressing its opinion that the petition was invalid. Plaintiffs filed a mandamus action alleging that the petition contains the signatures of more than twenty percent of the registered voters of the school district, and the board was required by law to undertake certain actions therein.

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[38] *Id.*

[39] Ambrogi v. Kootz, 297 S.E.2d 660 (Va. 1982).

[40] IND. CODE § 20-4-10.1-5(a)(1).

The trial court determined that the petition was invalid. The court ound that of the 659 signatures on the petition, eleven were duplicates, three were not accompanied by the date of signing, and wenty-four contained insufficient indicia of the residence of the ignatory. Reducing the total number of signatures to 621. Since 3,153 egistered voters reside within the boundaries of the school corporaion, twenty percent thereof would equal 631, a figure in excess of the 621 signatures found to be valid.

The court of appeals reversed, ruling that since the clerk of the couny was able to accurately determine whether twenty-four signatures in question were registered voters of the school corporation at appropriate ime, trial court erred in finding twenty-four signatures invalid for eason that residences of signatories were insufficiently indicated, and consequently, since number of valid signatures on petition to change nthod of selection of board of trustees of school corporation was in excess of twenty percent of registered voters of school corporation, the board was under clear legal duty to take appropriate action in conidering the petition as mandated by state statute.[41]

Interpretation of the New Jersey school board appointment statute was at issue in a recent case. This action involved a challenge to the manner of apportioning membership of the Shore Regional High School Board of Education. The regional district comprises the boroughs of Monmouth Beach, Oceanport, Sea Bright, and West Long Branch.

State statute provides that in making the apportionment of seats among the four constituent school districts, there shall be subtracted rom the number of inhabitants of a district the number of such inhabitants who are military personnel.[42] Located within the borough of Oceanport is an United States Army installation. Based upon this tatutory mandate, the regional superintendent notified the boroughs hat representation from the borough of Oceanport was to be reduced rom three seats to two. Plaintiff was a current member of the regional board from Oceanport. If the apportionment directed by the regional uperintendent took place it was her seat which would be lost by Oceanport. Plaintiff claimed denial of equal protection. The state court of New Jersey held that the apportionment statute requiring subraction from the number of inhabitants of a constituent school district of such inhabitants who are military personnel was unconstitutional as a denial of equal protection.[43]

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[41] State *ex rel.* Land v. Board of Trustees of Spring Valley School Corp., 430 N.E.2d 91 (Ind. Ct. App. 1982).

[42] N.J. STAT. ANN. § 18A:13-8 (West).

[43] Oceanport v. Hughes, 451 A.2d 966 (N.J. Super. Ct. Ch. Div. 1982).

1.6b Election Contests

In Missouri, contestants challenged the results of a school district election in which the school tax proposition passed by three votes and on recount passed by only two votes. The trial court ordered a new election on the ground that there were irregularities in the election of sufficient magnitude to cast doubt on its validity. Contestants asserted irregularities in three major areas: voter registration, ballot defects and absentee voting.

The official ballot had the voter vote "for the additional levy" or "against the additional levy." At the bottom of the official ballot was the following:

> Instruction to Voters: If you are in favor of the proposition, place an X in the box "Yes". If you are opposed to the proposition, place an X in the box opposite "No".

Contrary to this instruction, there were no boxes for making "Yes" or "No". There was no evidence that any voter was actually misled or caused to cast a vote contrary to his intention. Absentee voting irregularities provided the major issue. Seventeen absentee ballots were counted, with fifteen being "Yes" votes and two being "No" votes. Eleven of those seventeen absentee ballots were questioned by reason of failure to fill in the ballot envelope affidavit. Two had no name or address, five had no address and four were not checked as to reason to vote absentee. There was no evidence showing whether each of the eleven voted "Yes" or "No" on the levy.

The state appellate court held that the irregularities in absentee voting coupled with confusing instructions on the official ballot warranted another school district election. In addition, the court ruled that an absentee ballot must be rejected where the affidavit on the ballot envelope has not been filled in.[44]

1.6c Recall of Board Members

In West Virginia, illegally discharged school employees brought an action to remove members of the county board of education from office on grounds that they had improperly used county funds to pay attorney fees accrued in their defense arising from the wrongful discharges, and had illegally diverted school board funds for the purpose of insulating board members from personal liability.

The state appellate court held that if school board members acted in good faith when they illegally discharged school personnel, it was immaterial that they entered into a settlement with the aggrieved school personnel by which all damage issues were settled by payment of school board funds, in that if any damages had been recovered against members of the board as individuals, they would have had a right to indemnification from the board.

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[44] Gasconade R-III School Dist. v. Williams, 641 S.W.2d 444 (Mo. Ct. App. 1982).

The court also stated that if the school board members did not act in good faith when they illegally discharged school personnel, further inquiry must be made as to whether there was significant likelihood that damages would have been awarded against the school board members personally rather than against school board members in their official capacity, and, if that likelihood exists, whether settlement into which members of the school board entered reflected an illegal diversion of school board funds for purposes of insulating individual members from personal liability.[45]

An interesting recall case arose in Iowa. Certain electors of the school district brought a proceeding to remove three defendants as school board members. The plaintiffs alleged that the trial court was wrong in holding that they had not proven by clear and convincing evidence any of their numerous allegations of willful misconduct and maladministration. The defendants contended that defendant Koster should not be removed because he had been reelected to his office in September 1979 following the filing of the removal petition in July 1979. The record before the court showed that defendants Benda and Coleman were elected in 1978. The term of a school board member is three years. At oral argument counsel for plaintiffs agreed that Benda and Coleman were reelected in September 1981. The reelection of the defendants during the pendency of this action required the court to address the issue of whether their removal had been mooted under the general rule that offenses committed during a previous term of office are generally held not to furnish cause for removal.

The state supreme court viewed state statutes as implementing a legislative intent that a public officer guilty of willful misconduct be removed during the same term of office in which the conduct occurred that provided grounds for removal. The court held that a subsequent reelection where the alleged grounds for removal are well known to the electorate should moot the action. It was held by the court that the voters of the district had a chance to evaluate the charges, and their subsequent reelection of the school board members ratified their conduct in office and mooted the issues raised in the removal petition.[46]

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45. Martin v. Mullins, 294 S.E.2d 161 (W. Va. 1982).

46. State *ex rel.* Doyle v. Benda, 319 N.W.2d 264 (Iowa 1982).

1.6d Method of Selection of Board Members

In *Hathorn v. Lovorn,*[47] the United States Supreme Court examined the issue of whether a state court may order implementation of a change in election procedures over objection that the change is subject to preclearance under section 5 of the Voting Rights Act.[48]

A 1964 Mississippi statute provided that the board of trustees of municipal school districts in the state shall consist of five members, and that in any county in which a district embraces the entire county "in which Highways 14 and 15 intersect," one trustee shall be elected from each supervisors district. The Louisville School District is coextensive with Winston County and is the only county in which Highways 14 and 15 intersect. Since 1960, the Louisville mayor and city council appointed three of the five members of the district's board of trustees, and Winston County voters residing outside Louisville elected the other two members. The county official never implemented the 1964 statute. The voters of Winston County filed an action seeking to enforce the 1964 statute.

The Chancery Court dismissed the complaint on the ground that the statute violated the state constitutional bar against local legislation. The Mississippi Supreme Court reversed and remanded, striking only the statute's reference to Highways 14 and 15 and upholding the remainder of the statute. The state supreme court denied plaintiff's petition for rehearing in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under section 5 of the Voting Rights Act of 1965. On remand, the Chancery Court ordered an election pursuant to the redated statute under procedures prescribed by the court, but directed petitioners to submit the election plan to the United States Attorney General for preclearance under section 5. The Attorney General subsequently objected to the plan, and the Chancery Court ultimately concluded that its order would remain in force subject to compliance with the Voting Rights Act. Respondents once again appealed to the Supreme Court of Mississippi, which held that its prior decision was the law of the case and that the Chancery Court improperly conditioned the election on compliance with the Voting Rights Act.

The case was appealed to the United States Supreme Court which held that state courts had the power to decide whether preclearance requirements of the Voting Rights Act were applicable to a proposed change in election procedures and that state courts would be required to withhold further implementation of a disputed change in election procedures for membership on the school board until the parties demonstrated compliance with the clearance requirements of section 5.[49]

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[47] 102 S. Ct. 2421 (1982).

[48] 42 U.S.C.A. § 1973c, *amended by* 42 U.S.C.A. § 5.

The United States Supreme Court also handed down *Rogers v. Lodge*[50] in 1982. Burke County, Georgia, a large, predominantly rural county, had an at-large system for electing members of its governing board of commissioners. No black had ever been elected to the board. Several black citizens of the county filed a class action alleging that the at-large system of elections violated the fourteenth and fifteenth amendments by diluting the voting power of black citizens.

Finding that blacks had always made up a substantial majority of the county's population but that they were a minority of the registered voters, that there had been bloc voting along racial lines, and that past discrimination had restricted the present opportunity of blacks to participate effectively in the political process, the federal district court held that although the state policy behind the at-large electoral system was "neutral in origin," the policy was being maintained for invidious purposes in violation of plaintiff's constitutional rights. The court then ordered the county to be divided into districts for purposes of electing county commissioners.

The Fifth Circuit Court of Appeals affirmed the decision of the lower federal court.[51] The United States Supreme Court also affirmed the result and reasoning of the district court. The Court ruled that the district court applied the proper legal standard in ruling that demonstration of "intention" is necessary under both the fourteenth and fifteenth amendments as requisite to finding unconstitutional vote dilution. The Court also sustained the district court's choice of utilizing single-member districts as a remedy for the restriction of access to the county's black citizens to the electoral system and maintenance of the at-large system for invidious purposes.[52]

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[49] *Accord,* Edge v. Sumter Cty. School Dist., 541 F. Supp. 55 (M.D. Ga. 1981). In *Edge,* the court ruled that where a change in the method of electing board members to an at-large method was made by the legislature and thus reflected the "policy choices of the elected representatives of the people," adoption of the at-large system was subject to preclearance of the Voting Rights Act. Therefore, the elections held under the at-large system were in violation of section 5 of the Act.

[50] 102 S. Ct. 3272 (1982).

[51] 639 F[illegible]358 (5th Cir. 1981).

[52] *Accord,* NAACP v. Gadsden Cty. School Bds., 691 F.2d 978 (11th Cir. 1982), and Brown v. Board of School Comm'rs of Mobile Cty., Alabama, 542 F. Supp. 1078 (S.D. Ala. 1982). In *NAACP*, the eleventh circuit held that to prevail in a vote dilution case under the equal protection clause of the fourteenth amendment, a plaintiff must demonstrate (1) the existence of a discriminatory purpose in either the enactment or operation of the election scheme; and (2) differential impact, *i.e.*, dilution of the minority's voting power.

A federal district court from Georgia addressed the constitutionality of the single-member system for the election of school board members. This was an action pursuant to 42 U.S.C. § 1983 in which plaintiffs sought declaratory and injunctive relief. The plaintiffs claimed that they, as black citizens, were being denied the opportunity to participate effectively in the election of the members of the county school board. Before the court was the plaintiff's motion to enjoin the school board election which was scheduled for November 2, 1982.

The complaint was that the seven districts from which the members of the school board were scheduled to be elected were intentionally drawn to dilute the voting strength of black citizens. Although conceding that blacks were not entitled to proportional representation, the plaintiffs argued that the districts in question were drawn so as to concentrate blacks into one district and to thus minimize black voter strength by insuring that no more than one black board member would be elected.

The federal district court held that the plaintiffs had the burden of showing that the single-member school district plan was conceived as a purposeful device to further racial discrimination. However, the court stated that discriminatory purpose in school board districting need not be proven by direct evidence in civil rights actions. The court ruled that plaintiffs failed to establish that the plan was enacted with the purpose of limiting black voter strength and thus did not establish a substantial likelihood of success on the merits required to enjoin school board election.[53]

1.6e Disqualification of Candidates

Prior to the May 14, 1982, deadline, plaintiff, Burns, and defendants, Kurtenbach and Scholten, filed their nominating petitions for school board member with the business manager of Brookings School District in South Dakota. The school board election was scheduled for June 15, 1982. Burns was the only candidate who had signed the circulator's verification as required by state statute. The other candidates

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Contra, United States v. Dallas Cty. Comm'n, 548 F. Supp. 794 (S.D. Ala. 1982). In this case, the United States filed an action against a county and others alleging that the at-large election system used in the county unlawfully diluted the voting strength of the black electorate. With respect to the county board of education's motion to dismiss, the district court held that the at-large voting system for the county school board did not unlawfully dilute the voting strength of the black electorate of the county, as the factual findings indicated clearly that blacks register, vote, run for office, serve as election officials and otherwise participate fully in the election process in the county, without discrimination and without distinction of race, color or previous conditions of servitude.

53. Brantley v. Brown, 550 F. Supp. 490 (S.D. Ga. 1982).

relied on the advise of the business manager, who informed them that the circulator's verification need not be signed if the nominating petition had been circulated by a candidate or a member of his family.

The business manager died on May 17, 1982. Burns became aware that the other candidates had not executed the circulator's verification. Pursuant to the advice of the school district's attorney, the other candidates executed the verifications and backdated them to the date when each had originally submitted his petition to the district's business manager.

Burns commenced an action in circuit court challenging the validity of the other candidate's nominating petitions. On June 15, 1982, Kurtenbach and Scholten were elected to fill the two vacancies on the school board. The defendants contended that the Supreme Court of South Dakota did not have original jurisdiction in quo warranto in a case such as this. The state supreme court held that it did have jurisdiction in a quo warranto proceeding challenging the validity of school board candidates' nominating petitions. The court also ruled that the defendants were ineligible to serve as board members since their nominating petitions failed to contain an executed circulator's verification prior to the statutory deadline for filing, and backdating the document did not cure the defect nor did receipt of erroneous advice from the district's business manager excuse the candidates conduct in this case.[54]

1.7 SCHOOL DISTRICT ORGANIZATION

In a Missouri case involving the creation of a new school district, plaintiffs sought a compulsory directive that the commissioner of education and the state board of education implement procedures leading to an election for the establishment of a six-director school district in the city of St. Peters. The growing community of St. Peters is served by three school districts, each of which also includes rural areas of sizable proportions beyond the St. Peters city limits. With the stated intention of creating a new St. Peters School District, residents of St. Peters presented a petition bearing 625 signatures to the commissioner of education in July, 1978. The petition contained only the signatures of citizens residing in St. Peters.

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[54] Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982). In a similar case, Havens v. Miller, 429 N.E.2d 1292 (Ill. Ct. App. 1981), candidates for school board were ineligible for office because they failed to follow mandatory requirements that nominating petitions include a sworn statement from the persons who circulated the sheet including a statement of his residence address, and that people who signed the petition were registered votes who gave their correct residence address.

The state appellate court held that the petition for creation of six-director school district in a city served by three school districts was insufficient to require implementation of procedures for creation of district where the petition was signed only by persons residing in one school district and not by any persons residing in the other two affected districts.[55]

In Nebraska, the board of education of Minden School District R-3 voted to authorize a joint petition with the board of education of Heartwell School District R-4 to change the boundaries of the two school districts. The board of education of Heartwell School District R-4 also voted to authorize the joint petition. The petition sought to change the boundaries of the two districts and detach the various tracts of land from the Heartwell district and attach, annex, and include them in the Minden district. The petition called for the transfer of twenty-eight parcels of land totaling 4,392 acres. None of the tracts to be transferred were contiguous to the Minden district. The plaintiffs contended that a school district must consist of one compact contiguous area of land within one set of boundary lines, and that under state law separate legally described tracts of land in one school district cannot be transferred to another school district to which they are not contiguous. The state supreme court held that the proposed reorganization was valid. The authorization to change school boundaries is not limited to lands in one compact contiguous area.[56]

1.8 SCHOOL BOARDS AND TRANSPORTATION OF STUDENTS

1.8a Bus Contracts

In a case from New York, Parochial Bus Systems and the board of education of the City of New York entered into a contract on September 7, 1981, whereby Parochial was to transport students to and from school. By mutual agreement, this contract was extended through June 30, 1979. On February 16, 1979, a competing transportation union staged a wildcat strike against other bus companies that transported students for the school board. This wildcat strike occurred during the period of February 16, 1979, through May 10, 1979.

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[55] Naugher v. Mallory, 631 S.W.2d 370 (Mo. App. Ct. 1982).

[56] Heartwell School Dist. v. Jepsen, 319 N.W.2d 68 (Neb. 1982). For a discussion of a similar issue, *see In re* Freeholders Petition, 316 N.W.2d 294 (Neb. 1982), in which the court stated that while the term "adjoin" as used in statute ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district; thus, two school districts were adjoining even though separated by a river which did not lie within the boundaries of either district.

The vice president of Parochial stated in a sworn affidavit that he was unable to transport the school children because of violence accompanying the wildcat strike. The chairman of the union representing Parochial stated that his members, other than Parochial, were ready, willing and able to work during the strike. However, Parochial made a decision that it was too hazardous for the buses to run. During the entire strike period, 100 to 300 pickets were purportedly posted outside the Parochial terminal. As a result of the unavailability of Parochial, the school board found alternative methods of transporting its students by contracting with another bus company. The school board contended that Parochial could have provided bus service, without hazard, during the strike.

In an action brought by Parochial against the school board for damages during the period of the wildcat strike, the court held that evidence was sufficient to establish that the business company did not undertake even a minimal risk of crossing the picket line to run buses during the course of the strike, and thus evidence established that the company was unready and unwilling to attempt performance of its transportation contract and was not entitled to damages under the cessation of service clause in the contract.[57]

1.8b Bids

An action from New York raised questions as to the proper method for replacing services supplied pursuant to a city-wide contract for transportation of handicapped public school students if the bus company defaults. In 1979, the board of education, after public bidding pursuant to law, entered into a contract with Master Coachman Company for supplying transportation services to disabled students. While the contract was in force, a long strike of school bus drivers in New York City took place. A number of contractors defaulted since the strike, requiring the school board to replace their services. The Master Coachman Company brought suit contending that public bidding was not required for the replacement of bus companies which had defaulted on such transportation contracts. The court ruled that public bidding was the proper method for replacing bus services notwithstanding a provision in the original contract that if there was an increase in need of a specific type of vehicle during the life of the contract, the board might ask the contractor currently providing that service to provide an increase in service. The court dismissed Master Coachman's petition.[58]

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[57] Parochial Bus Sys., Inc. v. Board of Educ. of City of New York, 457 N.Y.S.2d 285 (N.Y. App. Div. 1983).

[58] Master Coachman Co. v. Board of Educ. of the City of New York, 456 N.Y.S.2d 946 (N.Y. Sup. Ct. 1982).

A competitive bidding case was decided last year in Illinois. Plaintiff Willett Motor Coach Company brought an action for injunctive and declaratory relief against the board of education of Chicago and certain bus companies which sought: (1) revocation of three year contracts awarded for transportation of handicapped children; (2) a requirement that the board rebid those contracts; and (3) a declaratory judgment holding illegal the bidding procedure on which the contracts were predicated, and that all bids received pursuant thereto are null and void. Willett claimed that the board failed to mail and that it did not receive a "Notice to Bidders" containing an amendment to the board's original solicitation for bids. Holding for the plaintiff, the state appellate court held that absent evidence that rules promulgated by the school board with regard to competitive bidding and mailing procedures were actually followed in instance of first amendment to the bidding procedures on contacts awarded for transportation of handicapped students, the relief sought by the unsuccessful bidder was warranted.[59]

1.8c Duty to Provide Transportation

Defendant Alpena Public Schools, one of the largest in Michigan, serves approximately 6,850 students and covers an area in excess of 600 square miles. Prior to the eruption of this controversy, approximately 5,140 of those students were bused to and from school in thirty-nine buses provided by the district. The cost to the district was approximately seventy-five cents per student per mile. At that time, the State of Michigan was reimbursing the district for forty percent of the transportation costs. At the beginning of the 1981-1982 school year, all voter-approved operating millages of Alpena Public Schools had expired. The only funding available to the district was an allocated millage of 7.98 mills and state school aid payments.

The Alpena Board of Education conducted a meeting and assessed its options in light of the available funding. According to school officials, the projected cost of providing bus transportation for students for the remainder of the school year would be approximately $800,000. If the school district were to have implemented such a plan, it would have been forced to close some schools. Other possible ramifications were increased class sizes, reduction of counselling, and cutbacks in libraries, new supplies and books. Faced with such alternatives the board decided, in the exercise of its discretion, to stop providing student transportation. The Court of Appeals of Michigan held that while under the state constitution citizens have a fundamental right to a free public education, neither the constitution nor state statute required the board to provide students with transportation to and from school. The court concluded that the local board did not abuse its discretion in deciding to stop providing transportation to and from school, in light of the shortage of funding.[60]

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[59] Willett Motor Coach Co. v. Board of Educ. of City of Chicago, 431 N.W.2d 1190 (Ill. App. Ct. 1982).

The law of the State of New Hampshire requires school districts to provide free school bus transportation to most pupils under the age of fourteen. Bus drivers began to complain about vandalism and disruptive conduct on certain bus routes. The private company supplying the bus service complained to the school board. After a hearing, the board adopted a policy where as a last resort, it could suspend the entire bus route for up to five days as a result of student disciplinary problems. The objecting parents claimed that their children were not the ones who caused the trouble. They attacked the suspension policy as unfair for it made their children suffer for the sins of others and they claimed it violated both state and federal law. The First Circuit Court of Appeals held that a school board's policy of suspending bus routes was not unreasonable even though the policy deprived pupils who took no part in any trouble-making activities of bus transportation.[61]

The issue of public transportation of parochial school students was litigated in an Indiana case. A group of parents sued the South Bend School Board asking that their children be transported to private schools and requested the board to furnish extra buses for that purpose. The parents raised various constitutional arguments upholding their view, but the court rejected those arguments and ruled that the federal and state constitutions do not require the state to provide parochial school children with transportation to and from school on the same terms as public school children.[62]

In Pennsylvania, the Albert Gallatin Area School District provides kindergarten classes for all eligible children residing in the district. The school district provides round-trip busing to elementary school children who attend the four public schools. The board in May of 1980, when considering a budget for the 1980-1982 school year, allocated sufficient funds to bus kindergarten children to and from their homes. At the July, 1980 meeting, however, the board decided not to utilize the allocated funds for round-trip busing, but rather, to allow kindergarten students to ride to school on the regular elementary school buses for the morning session or to ride home on the elementary buses at the close of the afternoon session.

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[60] Lintz v. Board of Educ., Alpena Pub. Schools, 325 N.W.2d 803 (Mich. Ct. App. 1982). *See also* Sutton v. Cadillac Area Pub. Schools, 323 N.W.2d 582 (Mich. 1982) (where the court held free public transportation is not required of Michigan public school districts).

[61] Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).

[62] Frame v. South Bend Commun. School Corp., No. S81-0344 (N.D. Ind. 1981).

This decision meant that the school district did not have to engage additional buses and drivers especially for the kindergarten children, during the middle of the day. It also meant that parents of kindergarten students had to assume the responsibility of transporting their children either to or from school, depending on which session their children attended.

The Third Circuit held that the decision of the board did not violate either the due process or equal protection clauses, in that the decision was supported by rational basis, namely, the savings of funds to school district which would result from not employing drivers or engaging buses at midday.

The United States Supreme Court in *San Antonio v. Rodriquez*[63] has conclusively rejected wealth as a suspect class, and education as a fundamental right. The court held that *San Antonio* made clear the error of the district court in applying the compelling state interest test in this case. The most the plaintiffs could seek, in the instant case, was the application of the traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to a legitimate state purpose. The Third Circuit ruled that the board's decision, in the face of limited funds, was clearly rational.[64]

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[63] 411 U.S. 1 (1973).

[64] Shaffer v. Board of School Dirs., 687 F.2d 718 (3rd Cir. 1982).

2

EMPLOYEES

Joseph C. Beckham

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2.0 INTRODUCTION

The following descriptive analysis of cases involving legal issues in public school employment follows the format developed in previous editions of this *Yearbook*, but omits consideration of cases involving disability and retirement. Cases selected for inclusion in this chapter involved public school employees or local, state or federal education agencies as principal parties, but do not include employment issues in the private sector.

2.1 DISCRIMINATION IN EMPLOYMENT

The shifting burden of proof in discrimination cases involving alleged violation of federal statute law continues to dominate litigation in the public employment sector. While appellate decisions often deal with federal constitutional questions as well, the predominant issues in current discrimination suits deal with provisions of Title VII and section 1983 of the Civil Rights Act of 1964.

2.1a Race

The nature of a defendant school district's rebuttal burden in a case involving discrimination on the basis of race can vary with the nature of the evidence presented by a plaintiff. School teachers who were not renewed by a district board contended that they had been discriminated against on the basis of race in violation of the equal protection clause of the fourteenth amendment. Using the test developed by the Supreme Court in *Texas Department of Community Affairs v. Burdine*,[1] the district court concluded that the school district need only articulate a legitimate, nondiscriminatory reason for discharge.[2] The Eleventh Circuit Court of Appeals found the district court's analysis insufficient. Reviewing a record in which considerable testimony made direct reference to the racially motivated intent of school board members, the court of appeals compelled remand for further review and analysis by the district court.[3] The admonishment on remand included a distinction between principles articulated in *McDonnell Douglas v. Green*[4] and *Mt. Healthy City School District v. Doyle.*[5]

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[1] 450 U.S. 248 (1981).

[2] *Id.* at 257-58.

In a case in which a black educator and former principal sought injunctive and other equitable relief based on provisions of Title VII of the Civil Rights Act of 1964,[6] the Court of Appeals for the Fourth Circuit ruled that the district court erred in refusing injunctive relief and in allocating the burden of persuasion in rebutting a claim of racial discrimination. A recent history of de jure racial discrimination in the school district was a primary consideration in shifting the burden of persuasion to the school system to rebut a prima facie claim of discrimination. On the basis of the record, the appellate court was unable to determine if the district court had required the school board to assume the burden of persuasion, and remanded for reconsideration of this issue, awarding attorney's fees to the educator as a prevailing party in the appeal.[7]

A black educator's employment discrimination suit was held to be time-barred in that the applicable statute of limitations of 180 days had run relative to any claim arising under Title VII of the 1964 Civil Rights Act.[8] However, the Eleventh Circuit remanded one claim of discrimination under the Civil Rights Act[9] for a determination of whether race played a role in the staffing of one principalship for which the black applicant was qualified. The record indicated that a white applicant of similar qualifications was selected because of a certificate of service with more years than the black applicant. However, the school district's witness conceded that such a certificate was not required to perform the job of principal. Given this information, together with testimony that a white principal was needed at the school in question because a black assistant principal was already at the school, the court remanded for consideration of a genuine issue of fact.[10]

2.1b Sex

The requirement that a school board show by a preponderance of the evidence that the employee would have been dismissed notwithstanding the conduct protected under the United States Constitution was considered in a Fifth Circuit Court of Appeals' decision involving a teacher who was dismissed when she notified the board that she was pregnant out of wedlock. Upon a finding that discharge predicated on unwed parenthood violated the equal protection clause of the fourteenth amendment, the school board contended that discharge would have resulted even if the allegation of immorality were discharged, because the teacher failed to notify the superintendent by the fourth month of her pregnancy as required by district regulation. The court of appeals rejected this facile argument, pointing out that the school board must show that it would have dismissed the teacher in the absence of consideration of her out-of-wedlock pregnancy.[11]

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[3] Lee v. Russell Cty. Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).
[4] 411 U.S. 792 (1973).
[5] 429 U.S. 274 (1977).
[6] 42 U.S.C. § 2000(e).
[7] Evans v. Harnett Cty. Bd. of Educ., 684 F.2d 304 (4th Cir. 1982).
[8] 42 U.S.C. § 2000(e)5.
[9] 42 U.S.C. § 1981.
[10] Stafford v. Muscogee Cty. Bd. of Educ., 688 F.2d 1383 (11th Cir. 1982).

The Ninth Circuit Court of Appeals overruled a federal district court's determination granting summary judgment in favor of a school district where the appellate court concluded that a genuine issue of fact existed as to whether a school principal's reassignment and subsequent discharge were the result of sex discrimination by the superintendent. The appellate court reviewed a record in which the superintendent's "attitudinal disposition" suggested difficulty in relating to women administrators and particular problems in working with the woman principal in the case. This evidence of a general disposition suggestive of sexism and animosity toward the principal might lead a jury to conclude that the real reason for reassignment and discharge was prejudice against women rather than financial exigency.[12]

The use of subjective promotion procedures, particularly "availability" for the job and willingness to work long hours, were given close scrutiny by the Eighth Circuit Court of Appeals in a Title VII sex discrimination case involving salary levels and promotion for female administrators, counselors and coaches. The school district was held to have unfairly emphasized one female teacher's family responsibilities as a factor in denying her a position as director of a teacher center. Persuasive evidence of preselection led the court to find that the school district had engaged in a further discriminatory practice with regard to the assignment of a counselor to fill a vacation position. (Testimony undisputed by the school district tended to show that the position announcement was not listed until after the position had been filled by a male applicant and the job requirement, certification in counseling and in French, was carefully tailored to fit the single male applicant within the district.) Finally, the court concluded that a prima facie case of discrimination in pay and promotion to positions could not be sustained since the statistical evidence consisted of a small sample size for promotion and failed to consider the effect of education and experience together on salary. However, the court did find evidence to sustain a prima facie case of discrimination in that female coaches were given shorter term contracts, lower salaries and smaller extra duty stipends than male coaches who performed essentially the same duties.[13]

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[11] Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982).

[12] Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).

Although successful in establishing a prima facie case of age and sex discrimination under the *McDonnell Douglas* standard, a Title I part-time teacher lost her pro se appeal from a decision dismissing her claim with prejudice. In response to plaintiff's prima facie proof of discrimination, the school district presented what the trial court described as "overwhelming" evidence that the denial of a position to the teacher was free of unlawful discrimination. The record showed that the teacher had been a disruptive rather than contributive factor in the school system, and the trial court found that the teacher was denied renewal because of her unwillingness to observe rules and regulations, failure to work harmoniously with other staff and refusal to submit documentation essential to her employment. Finding no error, the Eighth Circuit Court of Appeal affirmed.[14]

Title IX of the Education Amendments of 1972 provides that "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance."[15] The United States Supreme Court has interpreted this statute to protect employees as well as students, though the application of the law appears to be limited to sex discrimination in the specific program receiving federal funds.[16]

The responsibility for policing sex discrimination in employment under Title IX falls to the Department of Education, which may institute action to withhold federal funds from any program that engages in illegal sex discrimination. While the law is "program specific" and limited to the program or part of a program in which sex discrimination is found, the Court did appear to recognize that a program can be "infected" by the discriminatory policies of an institution or the large environment, thus keeping open the door to a claim that system-wide discrimination had unduly influenced employment decision-making in the specific program.[17]

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[13] Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982).

[14] Scharnhorst v. Independent School Dist. No. 710, 686 F.2d 637 (8th Cir. 1982).

[15] 20 U.S.C. § 1681.

[16] North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982).

[17] *Id.*

A school board policy that denied credit toward seniority for service preceding a resignation was successfully challenged by a teacher who had been forced to resign due to pregnancy and was later reemployed by the school district. In affirming a decision of the New York State Division of Human Rights, the appellate court noted that the discriminatory practice was not the forced resignation policy that had been rescinded by the school board, but the computation method for seniority which disallowed all credit. The seniority computation scheme, by taking into account a forced resignation due to pregnancy, imposed a distinct burden on the teacher, imposing an unfavorable employment consequence attendant solely upon her pregnancy. The board's seniority computation effectively revived a discriminatory policy and constituted a separate discriminatory act—loss of seniority.[18]

2.1c Religion

A nontenured South Dakota junior high school teacher successfully established a prima facie case of religious discrimination under Title VII when he pleaded (and testimony confirmed) that his unapproved participation in a religious festival led to his discharge. The teacher, a member of the worldwide Church of God, informed the district one month in advance of his desire to attend a seven-day religious ceremony in October. The board refused to approve the request, contending that it would set a bad precedent for other leaves. Such a rationale was considered to evince the board's lack of willingness to accommodate the teacher's genuine religious beliefs. In response to the board's claim that accommodations would have been an undue hardship causing disruption of the school curriculum, the court took note of the fact that the teacher had made extensive lesson plans for the period of his absence, generating materials for use by students and detailed instructions for the substitute teacher. Testimony by the substitute teacher, principal and other members of the school staff failed to substantiate the board's claim of hardship based on disruption. The federal court found in favor of the teacher, holding the discharge unlawful, awarding backpay from the date of discharge to the date of entry of judgment, less the plaintiff's interim earnings.[19]

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[18] Board of Educ. of Farmingdale v. New York State Div. of Human Rights, 451 N.Y.S.2d 700 (N.Y. 1982). *But see* White v. Columbus Bd. of Educ., 441 N.E.2d 303 (Ohio Ct. App. 1982) (no violation in failure to grant seniority rights). *Contra* Northville Pub. Schools v. Michigan Civil Rights Comm'n, 325 N.W.2d 497 (Mich. Ct. App. 1982).

[19] Wangsness v. Watertown School Dist. No. 14-4, 541 F. Supp. 332 (D.S.D. 1982).

2.1d Age

In a memorandum opinion related to an action for wrongful discharge allegedly prohibited under the Age Discrimination in Employment Act of 1967 (ADEA),[20] a federal district court has ruled that the ADEA, as applied to a state's public schools, was a valid exercise of congressional power under the commerce clause and did not violate the tenth amendment.[21] In a decision upholding a regulation requiring mandatory retirement for school bus drivers upon reaching age 65, a New York court ruled the retirement age provision authorized by the ADEA was a bona fide occupational qualification.[22]

2.1e Handicap

The language of Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 and section 504 of the Rehabilitation Act of 1973 is virtually identical.[23] A comparison of the provisions of the three statutes has led a federal district court to the conclusion that a blind mathematics teacher, who alleges employment discrimination based solely upon her handicap, can maintain an action under the provisions of the Rehabilitation Act. The decision, which follows the reasoning of the United States Supreme Court in *North Haven Board of Education v. Bell,*[24] precluded summary judgment in favor of the school board.[25]

2.2 SUBSTANTIVE CONSTITUTIONAL RIGHTS

Allegations of a denial of free speech under the first amendment is the most frequent substantive constitutional claim pressed by a plaintiff-employee in cases involving an adverse employment decision. Often these claims depend upon a careful analysis of factual questions initially resolved at the trial court level and reviewable only under the appellate court's "clearly erroneous" test.

2.2a Speech

Even if a probationary teacher could have been denied contract renewal by a school board for no reason, he or she may establish a claim for reinstatement where it is established that the decision not to renew was made in retaliation for the exercise of a constitutional right to free speech. Initially, the burden is on the nonrenewed teacher to establish that his or her conduct was protected and that the exercise of free speech was a substantial or motivating factor in the adverse employment decision. If the teacher can establish this claim, then the board must show by a preponderance of evidence that it could have reached the nonrenewal decision absent consideration of the protected speech.[26]

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[20] 29 U.S.C. § 621.

[21] Kenny v. Board of Trustees of Valley Cty. School Dist., 543 F. Supp. 1194 (D. Mont. 1982).

[22] Sposato v. Ambach, 453 N.Y.S.2d 149 (N.Y. Sup. Ct. 1982).

[23] *Compare* 42 U.S.C. § 2000(d) *with* 20 U.S.C. § 1681 *and* 29 U.S.C. § 794.

[24] 102 S. Ct. 1912 (1982).

[25] Pittsburgh Fed'n of Teachers v. Langer, 546 F. Supp. 434 (W.D. Pa. 1982).

In one federal district court decision, numerous allegations of denial of due process and discrimination were dismissed due to lack of evidence, but an evaluator's recommendations not to renew a probationary teacher introduced a material issue of fact as to whether the teacher had been denied renewal for conduct protected under the first amendment. The court considered the whole evaluation record, including evidence the teacher was not renewed for inflexibility and lack of fairness in dealing with students, and concluded that the school board had established that the decision not to renew would have been the same despite the exercise of free speech.[27]

When a position elimination led to a proposal that two nontenured teachers share the remaining position, the more senior of the two employees opposed the plan and filed a grievance and accepted the administrator's recommendation to employ the less senior employee for the remaining position. Although the filing of a grievance is constitutionally protected conduct under the first amendment, the nonrenewed teacher did not show that the grievance was a substantial or motivating factor in the nonrenewal decision. Consequently, a jury verdict for the teacher was overturned and her complaint dismissed with prejudice.[28]

In affirming a determination that a school board's nonrenewal of teaching contracts was predicated upon the employee's circulation of a letter critical of board spending practices, the Eleventh Circuit Court of Appeals recognized the employee's right to presumptive reinstatement after a showing that the board had been sustantially motivated by the constitutionally protected conduct in refusing to rehire.[29] The court observed:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are

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[26] *See* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

[27] Derrikson v. Board of Educ. of City of St. Louis, 537 F. Supp. 347 (E.D. Mo. 1982). *See also* McGee v. South Pemiscot School Dist., 545 F. Supp. 171 (E.D. Mo. 1982).

[28] Renfroe v. Kirkpatrick, 549 F. Supp. 1368 (N.D. Ala. 1982).

[29] Allen v. Antauga Cty. Bd. of Educ., 685 F.2d 1302 (11th Cir. 1982).

> real and cannot be ignored. Yet at the same time, there is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public employee is discharged for a constitutionally infirm reason.
>
> [W]e cannot allow actual or expected ill-feeling alone to justify nonreinstatement.[30]

A journalism teacher who was advisor to the school-sponsored paper was unsucessful in his claim that his nonrenewal was substantially protected rights, specifically his refusal to submit articles to the school principal for prior review and approval. The teacher repeatedly refused to obey requests to submit proposed articles to the principal. In applying the *Mt. Healthy* rationale to the balancing test of *Pickering v. Board of Education*,[31] the Ninth Circuit concluded that the former teacher's actions had substantially disrupted relations among students, other faculty and administrators, having a detrimental effect on intraschool harmony. Furthermore, the district court's evidentiary finding that the nonrenewal was not motivated by a desire to deny the free expression of the former teacher or his students was substantiated by evidence of the teacher's failure to follow school recordkeeping responsibilities and to require students to follow school rules and regulations relative to class attendance.[32]

In a controversy which arose out of an Alabama school board policy on prior approval of attempts to disseminate documents to teachers and hold special meetings on school grounds, the Fifth Circuit Court of Appeals upheld a district court determination that the prior approval standards to be applied by administrators were imprecise and violated the right to free expression guaranteed by the first amendment. While the court emphasized that prior submission and approval is a valid regulatory requirement for a school distribution policy, the court found that the policy as written and applied by school administrators failed to furnish sufficient guidance to prohibit the unbridled discretion proscribed by the Constitution. The court found it particularly unsatisfactory that the policy lacked any procedure for prompt review of a school administrator's decision denying distribution of documents or refusing permission for an individual to visit a school campus.[33]

In the aftermath of *Givhan v. Western Line Consolidated School District*[34] federal courts were compelled to recognize that private criticisms of school policy may be protected under the free speech provision of the first amendment. The *Givhan* case involved the nonrenewal of a teacher who was said to have a "hostile attitude" and who made "petty and unreasonable demands" of her school principal. The United States Supreme Court recognized the teacher's right to criticize school policies in private meetings with the principal, but remanded for a determination as to whether the teacher would have been rehired *but for* her exercise of constitutionally protected free speech. The Fifth Circuit Court of Appeals has now affirmed a finding of the district court which held that the school district's primary motivation in failing to renew Givhan was to rid itself of a vocal critic of district policies. The school district's efforts to establish other grounds for Givhan's nonretention, which included a belated contention that Givhan was unwilling to administer tests and was peripherally involved in a knife-shakedown incident with students, were rejected as afterthoughts or pretexts.[35]

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[30] *Id.* at 1306.

[31] 391 U.S. 563 (1968).

[32] Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982).

[33] Hall v. Board of School Comm'rs of Mobile Cty., 681 F.2d 965 (5th Cir. 1982). *See also* Werner v. Middle Cty. Cent. School Dist., 454 N.Y.S.2d 116 (N.Y. App. Div. 1982).

[34] 439 U.S. 410 (1979).

2.2b Association

In another nonrenewal case, a director of vocational education alleged that his nonrenewal was based on his association with former members of the school board and on a letter he had written to the board. The right to freedom of association protected under the first amendment was recognized by the district court, but the court distinguished personal affinity from political expression of beliefs and held that a mere showing that the director was friends with former board members would not warrant Constitutional protection. As to the director's letter, it was established that the board members had voted against renewal of the director previous to receipt of his letter, thus the constitutionally protected exercise of free speech by the director was not a primary or motivating factor in nonrenewal by the board.[36]

2.2c Religion

In a case involving termination for negligence and persistent and willful violation of school laws, a tenured teacher sought to overturn the school board's dismissal decision by arguing a right to academic and religious freedom. An elementary school teacher had regularly undertaken religious exercises in his classroom, including Bible reading and audible prayer. Although state statutes permit a period of silent meditation, the Bible reading and extemporaneous prayer violated the first amendment's establishment clause and was not authorized by state law. The teacher's refusal to comply with the superintendent's directives to cease the religious exercises was held to be a valid cause for termination.[37]

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[35] Ayers v. Western Line Consol. School Dist., 691 F.2d 766 (5th Cir. 1982).

[36] Burris v. Willis Indep. School Dist., 537 F. Supp. 801 (S.D. Tex. 1982).

2.3 PROCEDURAL DUE PROCESS

There is no constitutional right to procedural due process unless the person has been deprived of a property or liberty interest. In the context of public school employment, the employee must demonstrate that a genuine entitlement has been denied or that a stigma has so foreclosed other employment opportunities as to invoke the protections of due process. Once it is determined that a deprivation has occurred, the court must resolve the question of what due process is due the employee. Aspects of state as well as federal law must be applied to assess the alleged deprivation and the requisite elements of notice and hearing that must be granted.

2.3a Property Interest

A teacher-coach employed under a series of three two-year contracts was not entitled to a due process hearing when he was offered a one-year contract and no property entitlement to a two-year or continuing contract existed under applicable state statute. Furthermore, when the school board sought to terminate the employee during the term of his contract appropriate written notice was provided and the opportunity to defend was reasonable despite the board's denial of a second continuance to the employee. (Discharge was appropriately predicated on several incidents in which the coach repeatedly threatened to kill colleagues, particularly the athletic director at his school.)[38]

A tenured teacher with an entitlement to due process under Illinois law was found not to meet the medical standard for teaching following a psychiatrist evaluation. The evaluation was compelled by the school superintendent after an investigation by the teacher's school principal led the principal to request the health examination. The teacher had complained that a student in his class sought to disrupt the class and turn other students against him. The principal requested that the teacher put his observations in a written memorandum, then used the memorandum as the basis for requesting the evaluation.

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[37] Fink v. Board of Educ. of Warren Cty., 442 A.2d 837 (Pa. Commw. Ct. 1982).

[38] White v. South Park Indep. School Dist., 693 F.2d 1163 (5th Cir. 1982).

As a result of the evaluation, the teacher was told that dismissal would be recommended if he failed to request a leave of absence. The teacher chose the leave, but later contended that he had been compelled to leave his position and denied due process. The court held that no due process denial occurred when the teacher exercised the option of a leave rather than defend against a proper dismissal hearing.[39]

In a wrongful discharge claim decided under West Virginia law, the principal was not limited to a recovery of lost wages for the term of the breached contract because the provisions of state statute grant a right to renewal and due process hearings before contract termination of probationary employees. Mitigation of damages is applicable, however, whether another job is comparable to the original work contracted for or not.[40]

North Dakota provides due process hearing rights to nontenured personnel in a contract nonrenewal. A school district initially offered a modified contract at substantially lower salary to a teacher, and then withdrew the contract offer on the theory that the teacher failed to accept. The teacher prevailed in her demand for a hearing before the board, asserting that the modified contract constituted a nonrenewal. However, the reviewing court concluded that the due process procedures granted the teacher were sufficient to inform the teacher and avoid any abuse of discretion by the board.[41]

In determining legislative intent to aid in interpreting the meaning of full-time teacher, an Illinois appellate court ruled that the status of a probationary teacher is different from that of a substitute teacher who taught in the school district for one full year and the substitute teacher would not be entitled to the notice provisions of the school code.[42] Probationary teachers in New Hampshire are not entitled, on due process grounds, to a statement of reasons for nonrenewal, nor were they entitled to personal notice of a school board agenda item relating to renewals, particularly where the collective bargaining agreement precluded personal notice.[43]

Under California law, a teacher reassignment from district high school to a middle school is valid if within the scope of the certificate under which the teacher obtained tenure and would not require due process hearings.[44] Under applicable Indiana statutes a teacher who taught under a supplemental services contract for more than 120 days during the school year was entitled to receive the same pay as a regular teacher and prior notice of nonrenewal of her contract.[45]

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[39] Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982).

[40] Mason Cty. Bd. of Educ. v. State Supt. of Schools, 295 S.E.2d 721 (W. Va. 1982). *See also* Brooks v. School Bd. of Brevard Cty., 419 So. 2d 659 (Fla. Dist. Ct. App. 1982) (allowing interest from date contracted debt became due).

[41] Quarles v. McKenzie Pub. School Dist., 325 N.W.2d 662 (N.D. 1982).

[42] Booker v. Hutsonville School Dist., 437 N.E.2d 937 (Ill. Ct. App. 1982).

[43] Brown v. Bedford School Bd., 448 A.2d 1375 (N.H. 1982).

In a case from the District of Columbia, a dismissed teacher who established that the school board's action in terminating her violated statutory due process requirements was successful in obtaining a rehearing on the dismissal before the school board. However, the dismissed teacher could not claim reinstatement and backpay if she could have been discharged once accorded procedural due process.[46]

An employee's contention that she was "demoted" in a reassignment from counselor to classroom teacher was rejected by a Missouri court on the grounds that no change in salary resulted. While no due process denial could be advanced by the reassigned employee, the court did remand for further proceedings on the issue of whether the transfer was punishment for the exercise of free speech.[47]

2.3b Liberty Interest

Demotion of a school principal to a position of teacher and football coach as not sufficiently stigmatizing nor violative of tenure law to create a denial of due process under Kentucky law. In the absence of tenure eligibility the demotion and later nonrenewal of the employee in consecutive years did not deprive him of a property right cognizable under federal law.[48]

A Missouri school board's decision not to renew a nontenured principal's contract did not deny any established "legitimate expectancy of continued employment" or create a stigma which would compel due process rights to a hearing where the former principal had a combined total of twenty-seven years employment either as a teacher or principal in the district but who had not been employed five times within the district as principal.[49]

The Fifth Circuit Court of Appeals upheld the extension of a student dress code, which prohibited the wearing of a beard, to all employees of the system. While the board's policy would proscribe a constitutional liberty interest in choosing how to wear one's hair, the court held that the interest may be reasonably regulated. In this case, the application of the code could be justified as furthering the school board's reasonable interest in teaching hygiene, instilling discipline, asserting authority and uniformity and was, therefore, a valid regulation.[50]

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[44] Malynn v. Morgan Hill Unified School Dist., 187 Cal. Rptr. 303 (Cal. Ct. App. 1982).

[45] New Castle Commun. School Corp. v. Watters, 437 N.E.2d 1372 (Ind. Ct. App. 1982).

[46] District of Columbia v. Gray, 452 A.2d 962 (D.C. Ct. App. 1982). *See also* District of Columbia v. Moore, 453 A.2d 808 (D.C. Ct. App. 1982).

[47] Glanville v. Hickory Cty. Reorganized School Dist., 637 S.W.2d 328 (Mo. Ct. App. 1982). *See also* Hood v. Alabama State Tenure Comm'n, 418 So. 2d 131 (Ala. Ct. App. 1982) (transfer to position outside area of certification).

[48] Board of Educ. of Bellevue v. Rothfuss, 639 S.W.2d 545 (Ky. 1982).

[49] Beal v. Board of Educ., 637 S.W.2d 309 (Mo. Ct. App. 1982).

2.3c Aspects of Notice

A school board's decision not to reemploy a probationary teacher was held to be invalid where the board failed to follow required evaluation procedures specified under state statute law and state regulation. The applicable state regulation prohibited discharge for reasons having to do with a remediable incompetency that had not been called to the attention of the employee through evaluation. The Supreme Court of Appeals of West Virginia ordered reinstatement of the teacher based upon a denial of due process which resulted from a combination of actions attributable to the local board and the school principal who was charged with conducting personnel evaluations. Among the cumulative acts which were construed as denying due process and lacking in open and fair evaluation protocol were conflicting evaluations of the probationary teacher's job performance. (The most negative evaluations came subsequent to the teacher's criticisms of the principal's methods of monitoring classroom activity through unannounced listening over the public address system.[51]

A West Virginia school board's failure to follow the evaluation procedures required by state board of education policy led to the reinstatement of a probationary teacher who was neither openly and honestly evaluated nor given a meaningful opportunity to improve performance. The record disclosed that classroom observations were limited and the teacher never received a conference on her teaching performance until after a nonrenewal recommendation had been submitted to the board.[52]

Notice requirements in cases of nonrenewal vary from state to state, but generally require timely notice in advance of the following school year and a reasonably effort to inform the nonrenewed employee. In Georgia, notice must be served personally or by certified mail delivered to the last known address of the employee. Although a certified letter constituting notice was sent to the teacher, the wrong address was affixed. Despite this flaw, the Supreme Court of Georgia held notice sufficient because the diligence of the post office insured compliance with the law. Specifically, the erroneous address was corrected by a postal employee, the correct carrier attempted delivery and left notice of the attempted delivery.[53]

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[50] Domico v. Rapides Parish School Bd., 675 F.2d 100 (5th Cir. 1982).

[51] Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).

[52] Lipan v. Board of Educ. of Hancock, 295 S.E.2d 44 (W. Va. 1982).

Substantial compliance with procedural and substantive provisions of the Arkansas dismissal statute was recognized by the Supreme Court of Arkansas in the nonrenewal of two district teacher-coaches. The coaches were given notive in 1979 of unsatisfactory performance related to their inability to field competitive football teams. In the absence of consistent improvement over a subsequent two-year period, the board gave notice it would consider nonrenewal, gave reasons for its action and held public hearings on the matter.[54]

Under statute law in Colorado the nontenured teacher is automatically reemployed for another annual contract period unless the school board gives written notice of nonrenewal on or before April 15th of each year. Following the generally accepted principle of strict statutory construction in matters of employment rights, the Colorado Supreme Court held that a probationary teacher was effectively renewed when the written notice was not received on or before April 15th. The school district could not deny renewal on the basis that the procedure for providing written notice had been initiated prior to the 15th or that the teacher had oral notice of the school board's vote not to renew on April 12th. In the absence of evidence that the teacher had sought to frustrate attempts to deliver written notice by avoiding receipt, the court held that written notice was not effective until received.[55]

Arkansas statute provides for automatic renewal of a teaching contract absent notice of nonrenewal. Substantial compliance with the notice of nonrenewal provisions was recognized by a federal court when oral notice of nonrenewal on the ground of declining enrollment was coupled with a letter from school administrators explaining that a computer error resulted in the issue of an erroneous contract for the upcoming school year. The court concluded that the letter constituted affirmative action by the school district clearly informing the teacher she would not be reemployed under the terms of the erroneous contract.[56]

Alabama statutes requiring that a probationary teacher be given notice of nonrenewal place the burden on local school boards to show that written notice was served. A local board attempted to deliver written notice before the end of school year deadline to a probationary teacher, but was unsuccessful. The appellate court refused to overturn a trial court's factual determination that there was sufficient testimony to establish that the teacher intentionally sought to avoid delivery of the notice of nonrenewal.[57]

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[53] Andrews v. Howard, 291 S.E.2d 543 (Ga. 1982).

[54] Lamar School Dist. No. 39 v. Kinder, 642 S.W.2d 885 (Ark. 1982).

[55] School Dist. RE-11J v. Norwood, 644 P.2d 13 (Colo. 1982).

[56] Gillespie v. Board of Educ. of North Little Rock, 692 F.2d 529 (8th Cir. 1982).

2.3d Aspects of Hearing

Some states offer greater due process protection than would normally be required under federal constitutional standards. In Iowa, the state administrative procedure act grants a right to a hearing in nonrenewals undertaken by a local board. However, such a hearing would not include an opportunity for the nonrenewed person to take depositions and receive delivery of taped board minutes.[58]

Oklahoma statute law requires that school boards grant notice and a hearing to probationary teachers who are not renewed. Due process in such cases has been further interpreted to require the local board to make findings of fact upon which the board's action is based so that a reviewing court may ascertain if the facts create a reasonable basis for the board's order.[59]

Under Oregon statute law a school board may dismiss a probationary teacher during the term of an annual contract for any cause the board may deem to be "in good faith." The dismissal must be preceded by written notice and an opportunity for a hearing. A probationary teacher who was dismissed and then granted a post-termination hearing by the school board alleged a denial of due process. While the teacher had a contractual property interest to serve a one-year term, the interest is subject to the school board's good faith decision to dismiss him. The Supreme Court of Oregon reviewed the school board's action and held there was no denial of due process. The court found that the dismissed teacher had received notice of the reasons for dismissal and an opportunity to be heard before the board prior to dismissal. After dismissal, he was given a formal hearing with representation by counsel and an opportunity to challenge witnesses, including the principal who sought his dismissal. Given the nature of the teacher's property interest, these procedures were sufficient.[60]

An Ohio tenured school teacher, dismissed following school board adoption of a hearing officer's finding that substantial evidence justified charges of insubordination, sought to overturn dismissal on the due process ground that he was denied a meaningful hearing by the board. A three-judge federal district court reviewed state statutes granting the teacher an option to have dismissal proceedings before an administrative referee or the local board, and found that procedural due process had been afforded through the teacher's election of a referee. The teacher's claim that constitutional due process should include a right to appear before the board and contest findings of the referee's report was denied after the court concluded that the teacher's property interest in his job was sufficiently protected by his appearance and opportunity to contest before the neutral hearing officer.[61]

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[57] Stollenwerck v. Talladega Cty. Bd. of Educ., 420 So. 2d 21 (Ala. 1982).

[58] Jones v. Loess Hills Area Educ. Agency, 319 N.W.2d 263 (Iowa 1982).

[59] Jackson v. Independent School Dist. No. 16, 648 P.2d 26 (Okla. 1982). *But see* Gee v. Alabama State Tenure Comm'n, 419 So. 2d 227 (Ala. Civ. App. 1982) (failure to make written findings of fact immaterial).

[60] Maddox v. Clackamas Cty. School Dist., 643 P.2d 1253 (Or. 1982).

A teacher who received an unsatisfactory rating sought review and the right to be heard on a request to have the unsatisfactory rating expunged. The format for such a review was provided under regulatory standards and included the right of a petitioning teacher to make a statement and question those presenting evidence. The review was characterized by intemperate language by the petitioning teacher which led the hearing officer to terminate the proceedings following a morning session in which the teacher had described the superintendent as a "liar." In compelling another review proceeding, the appellate court held that the petitioning teacher had been denied due process when the hearing officer terminated the proceeding prior to the presentation of the teacher's rebuttal statement. The teacher's disruptive behavior was not a sufficient justification for the hearing officer's action, rather, the hearing officer was held to have abused discretion in terminating the proceedings.[62]

Under Colorado statute law, a hearing panel is constituted to review and make findings of fact relative to charges which would be grounds for teacher dismissal. A local board rejected the findings of one such panel and undertook to obtain responses to written interrogatories which were relied upon as a basis for dismissal of a tenured teacher. In review, the trial and appellate courts limited review to those documents and reports of the hearing panel, holding that the board's fact-finding was a coercive intrusion into the fact-finding role of the panel and thus violative of the Colorado statute law.[63]

Sufficient grounds for dismissal was challenged by a tenured teacher convicted of driving under the influence of alcohol. The reviewing court concluded that the teacher was denied a fair hearing on the charge when the school board permitted a previous auto accident and a record of absenteeism to be considered at the dismisal hearing. Stripped of these latter allegations, neither of which were stated as charges in the written notice of offenses, the court concluded the record was insufficient to justify dismissal of the teacher.[64]

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[61] Jones v. Morris, 541 F. Supp. 11 (S.D. Ohio 1981), *aff'g*, 102 S. Ct. 1699 (1982).

[62] Swanteson v. Board of Educ., 450 N.Y.S.2d 579 (N.Y. Sup. Ct. 1982).

[63] Hudson v. Board of Educ., 655 P.2d 853 (Colo. Ct. App. 1982).

Maine's nonrenewal statute does not require the local board to give a cause for nonrenewal and confers no property right to continued employment for the probationary employee, despite a statutory amendment providing for a hearing and statement of reasons for nonrenewal upon request. The amendment did not create an implied "for cause" requirement under state law, and could not be used by a nonrenewed probationary teacher to claim a right to due process procedures that would obligate the school board to provide a hearing and carry the burden of proof to show good cause in a nonrenewal decision.[65]

A Pennsylvania school board's exclusion of expert testimony offered by employees demoted as a result of declining enrollment and economic conditions was held to be harmless error which did not deny due process of law. Although the employee's attorney was denied the opportunity to receive an answer as to whether the budget cut could be accomplished in some other fashion, he had elicited other responses from the witness which directly related to the validity of the board's decision to eliminate positions and demote employees. Therefore, the question would have only been cumulative in effect.[66]

The right to notice and a hearing are fundamental due process rights guaranteed by the fourteenth amendment whenever a property right to continued employment is denied. However, timely grievance arbitration under a collective bargaining agreement may be a valid alternative to a board hearing in disputed due process cases. An employee charged with theft, unauthorized use of school property and insubordination was given notice of his alleged misconduct and represented by a union official at a pretermination hearing before the school superintendent. Following the pretermination hearing he was advised that dismissal was recommended. He did not request a hearing before the board, but did grieve his discharge and ask for reinstatement. This proceeding met the requirements for a hearing, since an impartial arbitrator presided and granted the employee the right to present evidence and cross-examine witnesses.[67]

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[64] Turk v. Franklin Sp. School Dist., 640 S.W.2d 218 (Tenn. 1982).

[65] *See* Perkins v. Board of Dirs., 686 F.2d 49 (1st Cir. 1982).

[66] Chester Upland School Dist. v. Brown, 447 A.2d 1068 (Pa. Commw. Ct. 1982). *See also* Sto-Rox School Dist. v. Horgan, 449 A.2d 796 (Pa. Commw. Ct. 1982) (distinguishing due process in suspension and dismissal).

[67] Pedersen v. South Williamsport Area School Dist., 677 F.2d 312 (3d Cir. 1982). *See also* Levyn v. Ambach, 453 N.Y.S.2d 410 (N.Y. App. Div. 1982) (no error in hearing authority's disregard for mitigating testimony of teacher's psychiatrist).

Extreme or unusual circumstances involving substantial disruption of the school's educational program may justify immediate suspension of an employee without a pretermination hearing. In one such case, a Kansas teacher was alleged to have engaged in several instances of physical harassment and threats to students. The school board suspended the teacher without pay midway through his annual contract, then undertook to investigate the allegations and provide a subsequent due process hearing to consider termination. The court rejected any absolute due process right to a hearing prior to suspension without pay, balanced the due process right involved against the state's interest in preserving the orderly and safe operation of schools and found no basis for concluding that an erroneous deprivation of due process had occurred.[68]

2.4 DISMISSAL AND DISCIPLINE

The range of possible adverse employment decisions extends to many board actions in addition to dismissal. Demotion, denial of promotion or salary increment, reassignment, reprimand or transfer can be alternatives to discipline of the public school employee where authorized by state law. In general, however, the board's authority is most often challenged where dismissal of the employee is ordered.

2.4a Insubordination

Dismissal for unprofessional conduct, violation of corporal punishment policy and insubordination was upheld in an Arizona case in which the teacher failed to respond to repeated administrative requests to report on an incident in which she struck an elementary school pupil under her supervision. In defense of the teacher, it was established that her failure to report the incident or submit a written report was based upon the advice of her union representative and her legal counsel. However, the appellate court limited its review to a determination of whether the board's decision could be supported by substantial evidence and sustained the board.[69]

A tenured Colorado teacher was dismissed for neglect of duty and insubordination based upon failure to maintain classroom discipline and conform to administrative directives. Evidence to support these allegations included a history of incidents in past school years and documentation of warnings by the principal to correct perceived deficiencies.

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[68] Crane v. Mitchell Cty. Unified School Dist., 652 P.2d 205 (Kan. 1982).

[69] Fulton v. Dysart Unified School Dist., 651 P.2d 369 (Ariz. Ct. App. 1982).

The reviewing court held that prior warnings and the teacher's failure to conform thereto could properly be considered in an administrative hearing.[70]

Facts giving rise to a dismissal for insubordination were reviewed in a Supreme Court of Mississippi decision upholding a board's termination of a teaching contract. The record indicated that the teacher had repeatedly refused to sign an attachment to all district teaching contracts that had been proposed by the superintendent and approved by the board. After requesting on several occasions that the teacher sign the attachment, the superintendent wrote the teacher a letter telling her that if she did not sign within a given period of time he would recommend that she be dismissed for insubordination. The record disclosed other uncooperative behavior on the part of the teacher, but the high court concluded that even if the refusal to sign the attachment had been the sole reason for discharge it would have been sufficient.[71]

Following unsatisfactory ratings of classroom performance, an Arizona teacher was instructed to meet with the school principal on a daily basis for the purpose of reviewing lesson plans and upgrading performance. After sixteen meetings, the teacher refused to attend these sessions on the grounds that they were unproductive and designed merely as a scheme to support his dismissal. The school board's dismissal of the teacher on grounds of insubordination was upheld on the basis that his continuing refusal to attend the meetings was a willful disregard of a reasonable order.[72]

2.4b Unprofessional Conduct or Unfitness

A teacher who admitted that he brandished a starter pistol in an attempt to gain control of a group of hostile students was discharged for incompetence and gross lack of good judgment by a Louisiana school board. The appellate state court affirmed, finding that there was substantial evidence supporting a rational basis for the decision to terminate the probationary teacher.[73]

A state board determination that a school principal's use of the term "ass holes" in refence to parents and supporters of a rival football team did not warrant a five-day suspension was affirmed when the court considered the totality of circumstances surrounding the incident.[74]

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[70] Dekoevend v. Board of Educ. of West End, 653 P.2d 743 (Colo. Ct. App. 1982).

[71] Sims v. Board of Trustees of Holly Springs, 414 So. 2d 431 (Miss. 1982). *But see* Herod v. Board of Educ. of Hempstead, 456 N.Y.S.2d 84 (N.Y. App. Div. 1982) (substantial evidence necessary to support "gross insubordination" under the New York law.

[72] Siglin v. Kayenta Unified School Dist., 655 P.2d 353 (Ariz. Ct. App. 1982).

[73] Myres v. Orleans Parish School Bd., 423 So. 2d 1303 (La. Ct. App. 1983).

[74] Board of Educ. of Howard Cty. v. McCrumb, 450 A.2d 919 (N.Y. Ct. App. 1982).

New York grants board statutory authority to the Commissioner of Education in terms of reviewing determinations of employee hearing panels. Although a hearing panel rejected testimony that a photography teacher had knowingly shown pornographic films to his students, the reviewing court affirmed the decision of the Commissioner to dismiss the teacher. The court found sufficient evidentiary support in the hearing panel record to justify the Commissioner's decision and refused to overturn the dismissal on grounds it was arbitrary or capricious.[75]

A New York appellate court held that a school custodian, who had a long record of competent service, but whose continuing personality problems, lack of cooperation with school teachers and other staff, and failure to heed instructions to temper his conduct, interfered with the school's harmonious operation so as to justify dismissal.[76]

A former tenured teacher's claim for backpay and benefits, which was pressed by the administrator of her estate after her death, was denied on the ground that the teacher had been granted sick leave and a further leave of absence amounting to a period of two years and could be said to have abandoned her position in the district.[77]

A California appellate court has ruled that evidence of a large number of absences due to personal illness and illness of family members, together with complaints from three of sixteen substitute teachers that they received no lesson plans would not sustain an allegation of unfitness which would support the teacher's discharge.[78]

2.4c Immorality

Following repeated incidents of touching and stroking females in his fourth grade class, a Washington teacher was admonished and placed on probation during the following year. In that year parental complaints were investigated by the school principal. The teacher's inappropriate physical contact with female students was found to have reoccurred regularly. Following discharge, the teacher sought appellate review on the grounds that he had not been afforded a program to correct remediable deficiencies. In reviewing the statute requiring evaluation, notice and an opportunity to remediate, the court of appeals found the teacher's conduct to be inapplicable to the remediation statute. Only deficiencies in conduct which have an educational aspect or legitimate professional purpose such as classroom management, subject matter, knowledge or handling of student discipline, would be deemed remedial. The teacher's dismissal was affirmed.[79]

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[75] Shurgin v. Ambach, 451 N.Y.S.2d 722 (N.Y. App. Div. 1982).

[76] Koch v. Webster Cent. School Dist., 453 N.Y.S.2d 491 (N.Y. App. Div. 1982).

[77] West v. Board of Trustees of Eggertsville, 453 N.Y.S.2d 511 (N.Y. App. Div. 1982).

[78] San Dieguito Union High School Dist. v. Commission on Professional Competence, 185 Cal. Rptr. 203 (Cal. Ct. App. 1982).

In contrast to the previous case, a termination of an assistant principal was reversed in a New Mexico case when the state board of education adopted the view that evidence of an adulterous affair and allegations of sexual harassment constituted "unsatisfactory work performance" which required an opportunity for the principal to be informed and correct the deficiencies involved. The state court of appeals affirmed, recognizing the broad discretionary authority vested in the state board to adopt policies on the evaluation of employees.[80]

A Missouri teacher's dismissal for immoral conduct was sustained after the board heard evidence that the male teacher had engaged in relationships and homosexual contacts with boys between the ages of thirteen and twenty-one. The issue on appeal was whether the permanent teacher's due process rights were infringed by the school board's decision to proceed with a hearing before criminal charges were resolved. The teacher refused to appear to testify at his dismissal hearing due to the pendency of the criminal proceedings. The appellate court favorably weighed the strong interest the school board had in determining whether the teacher was guilty of immoral conduct in concluding that there was no denial of due process.[81]

A Georgia school principal who was convicted of submitting false documents to the Internal Revenue Service was properly dismissed from his position on the statutory ground of moral turpitude. Conviction of a crime as a basis for moral turpitude was upheld by the federal district court, notwithstanding the principal's contention that the statutory standard was vague in that conviction of a crime may be construed to exclude some criminal convictions as a basis for an adverse employment decision.[82]

A tenured professional employee who filed a report of excused absence due to illness was dismissed by the school board when later events established that she had misrepresented her reason for absence to attend a professional conference. Although the Pennsylvania Commissioner of Education rejected good cause termination based on the ground of immorality, the state appellate court reversed, upholding the authority of the board to determine what constitutes "immorality" upon consideration of community standards and sufficiency of evidence.[83]

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[79] Potter v. Kalama Pub. School Dist., 644 P.2d 1229 (Wash. Ct. App. 1982).

[80] Board of Educ. of Alamogordo v. Jennings, 651 P.2d 1037 (N.M. Ct. App. 1982).

[81] Lang v. Lee, 639 S.W.2d 111 (Mo. Ct. App. 1982).

[82] Logan v. Warren Cty. Bd. of Educ., 549 F. Supp. 145 (S.D. Ga. 1982).

[83] Bethel Park School Dist. v. Krall, 445 A.2d 1377 (Pa. Commw. Ct. 1982).

2.4d Incompetency

A local school board's decision to terminate a tenured teacher was sustained by the Supreme Court of Minnesota on the basis that substantial evidence of unfitness to teach, particularly evidence of lack of student progress, was supported in the administrative hearing record. The teacher had served for nineteen consecutive years in the school district, but had received previous notices of teaching deficiencies, including lack of rapport with students, poor communication with parents, failure to follow adopted school board lesson plans and irrational grading of students. Six classroom observations were undertaken over a five-month period and the teacher was regularly appraised of his deficiencies. In reviewing the entire record, the high court found that substantial evidence supported four major teaching deficiencies: (1) excessive use of worksheets, (2) lack of rapport, (3) lack of appropriate student discipline, and (4) lack of student progress. The latter basis, lack of student progress, was specifically related to express statutory grounds for discharge under Minnesota law.[84]

A case from Illinois illustrates the dimensions of effective evaluation when applied to a dismissal for negligent failure to supervise and instruct students. A tenured elementary school teacher was dismissed following parental complaints and classroom observations that consistently confirmed her inability to maintain classroom order or adequately prepare for subject matter discussion. Following initial complaints by parents and negative evaluations by the school principal, the teacher was informed by the school board of her specific deficiencies in teaching performance and provided with opportunities during the ensuing school year to improve. In the second year she was periodically observed by the principal and three other faculty members, all of whom evaluated the teacher's understanding of the subject matter and control over students as unsatisfactory. Sixty-four days of remediation were permitted, but no correction of deficiencies was noted by observers.

In affirming dismissal, the appellate court noted that the teacher's deficiencies were of long standing and represented fundamental teaching inadequacies. The notice provided was appropriate and the period of remediation was reasonable for correction of the deficiencies. The court's reliance on classroom observation reports completed by teachers and principal illustrates the considerable weight courts give to the evidentiary value of these records.[85]

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[84] Whaley v. Anoka-Hennepin Indep. School Dist., 325 N.W.2d 128 (Minn. 1982).

[85] Community Unit School Dist. v. Maclin, 435 N.E.2d 845 (Ill. 1982).

The Supreme Court of Iowa reversed a decision affirming dismissal of a teacher for failure to maintain a competitive wrestling program and lack of rapport with student athletes. Two evaluations, one of which rated the wrestling coach's performance as unsatisfactory on only two of forty-nine categories and a second which rated the coach as unsatisfactory in nine of the forty-nine categories served as part of the evidentiary record justifying dismissal. The court took note that the second evaluation was completed immediately after the evaluator met with disgruntled parents concerned with the wrestling program. No parent or student appeared at the dismissal hearing to corroborate complaints concerning the program, and the court considered significant the fact that the coach was not given an opportunity to remedy alleged deficiencies, nor were the deficiencies stated with sufficient specificity to inform the coach or the board of the factual basis for dismissal. A review of the record, including the testimony of students and parents who supported the coach, led the court to conclude that the charges lacked sufficient documentation to sustain the board's determination that dismissal was supported by a preponderance of the evidence.[86]

Lack of strict compliance with New Jersey statute law requiring classroom evaluations would not bar a school board from considering other factors relevant to teaching competency in determining to nonrenew a nontenured teacher. In affirming the nonrenewal, the local board's right to base its employment decision on a broad base of input from a variety of people, including students, parents and members of the public as well as a board member whose child was instructed by the teacher was sustained.[87]

2.5 REDUCTION-IN-FORCE AND ABOLITION OF POSITION

The principal legal challenges to school board layoffs based upon reduction-in-force continue to be related to the necessity for "riffing" and the selection of the employee to be "riffed." Courts appear willing to grant considerable discretion to local boards relative to the identification of the position or positions to be eliminated and remain somewhat more flexible when applying standards of due process in "riff" situations as opposed to dismissal for cause.

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[86] Munger v. Jesup Commun. School Dist., 325 N.W.2d 377 (Iowa 1982).

[87] Dore v. Bedminster Twp. Bd. of Educ., 449 A.2d 547 (N.J. Super. 1982).

2.5a Necessity for Reduction-in-Force

The Supreme Court Judicial Court of Maine grants substantial discretion to local school boards in determining when changes in local conditions "warrant the elimination of the teaching position."[88] When a school board voted to limit its budget for the academic year so that local tax effort would not be increased by more than two mills, two teaching positions had to be eliminated. The state's high court held that a school board decision to save money and conserve scarce educational resources by eliminating teaching positions did constitute a change warranting reduction-in-force (RIF) and only the board's exercise of that authority in bad faith for reasons unrelated to the best interests of education in the district would justify reversing the board's determination.[89]

A Minnesota school board's decision to place a full-time tenured teacher on unrequested leave of absence without pay was overturned on the grounds that the board failed to make specific findings of fact to justify alleged declines in enrollment and financial exigency.[90]

In interpreting the literal meaning of a collective bargaining agreement which provided that reductions in force could be compelled by a substantial reduction in student membership or financial resources, a Michigan appellate court held that "financial resources" meant all assets of the district and not just a projected $1,427,000 deficit based solely on projected revenues which fell short of potential operating expenses. In failing to consider the projected estimate of fund equity ($875,000) remaining at the end of the current fiscal year, the board had improperly construed the district's financial resources in invoking a layoff.[91]

2.5b Elimination of Position

Ordinarily, the bona fide elimination of a position is sufficient cause for termination of an employment contract. In a Kansas case, the school board discontinued a cooperative special education program and formed a new interlocal cooperative to provide special education services. In holding that the dissolution of the old cooperative and formation of a new administrative entity to provide special education services constituted good cause for nonrenewal of a tenured teacher's contract, the Supreme Court of Kansas was unwilling to infer bad faith or arbitrary action on the part of the school district despite the dissenting opinion of one justice that the teacher had been singled out from among fifteen teachers for nonrenewal.[92]

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[88] 20 Me. Rev. Stat. § 161.5.

[89] Paradis v. School Admin. Dist., 446 A.2d 46 (Me. 1982).

[90] Herfindahl v. Independent School Dist. No. 126, 325 N.W.2d 36 (Minn. 1982).

[91] Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 327 N.W.2d 413 (Mich. Ct. App. 1982).

Following the decision of two local districts to discontinue their participation in an educational cooperative, four tenured teachers assigned to the cooperative were suspended. Under New York statute law the four tenured teachers claimed that they should be considered employees of the school districts which took over the operations originally provided under contract with the cooperative and be granted tenure rights consistent with the tenure rights they maintained in the cooperative program. The New York appellate court, reviewing the statutory meaning for the first time, concluded that those teachers who were employed by the cooperative in programs taken over by the local districts were entitled to the benefits conveyed by the statute and could claim a right to be considered for newly-created local district positions based on consideration of their tenure in the cooperative.[93]

Declining enrollment and lack of sufficient funds served as the basis for a school board's transfer of assistant principals to teaching positions within a Washington school district. The board's policy effectively eliminated vice-principal positions in elementary schools, but a position of head teacher was created in five of the twelve affected schools in response to administrative concern. Only one of the transferred vice-principals was chosen to fill a head teacher position.

The transferred employees alleged that the school board was arbitrary and capricious in selecting the elementary school vice-principal position as the position to be eliminated and in the board's failure to give preferential consideration for head teaching positions to the transferred vice-principals. The Supreme Court of Washington approved the consolidation of roles and the reassignment to teaching positions as within the broad discretionary powers of a school board in providing for the district's educational goals and program continuity. Reclassification and consolidation of position was viewed as central to the board's authority to respond to budget deficits. Once reclassification to a head teaching position had occurred, the board was required by law to fill the positions with the most senior teacher.[94]

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[92] Sells v. Unified School Dist. No. 429, 644 P.2d 379 (Kan. 1982). *See also* NEA-Valley Center v. Unified School Dist. No. 262, 644 P.2d 381 (Kan. 1982).

[93] Acinapuro v. Board of Co-Operative Educ. Servs., 455 N.Y.S.2d 275 (N.Y. Sup. Ct. 1982).

[94] Williams v. Seattle School Dist. No. 1, 643 P.2d 426 (Wash. 1982). *See also* Stafford v. Board of Educ., 642 S.W.2d 596 (Ky. 1982) (transfer void where board failed to include recommendation required by statute of superintendent in official minutes).

California law permits the layoff of tenured professional employees when "a particular kind of service is to be reduced or discontinued"[95] however some ambiguity surrounds the meaning of "particular kind of service." In interpreting the meaning of the statutory language, California courts considered a case in which the local board sought to eliminate eleven kindergarten through sixth grade classes to effectuate reduction in program. The teachers whose positions were eliminated argued that no service could be reduced which was not capable of elimination under state law. The court held otherwise, granting school board's the discretion to reduce services in state mandated programs provided that the reductions did not result in the elimination of services required under California law.[96]

Two school principals sought to challenge an Ohio school board's decision to transfer them to positions as assistant high school principals under a reduction-in-force compelled by declining enrollment. A federal district court denied a preliminary injunction and dismissed the complaint, holding that plaintiffs had not shown evidence of irreparable harm justifying injunctive relief nor had they established federal question jurisdiction in claiming a denial of due process attendance to their transfers. The principals had sought to establish an expectancy of employment to their positions compelling procedural due process before "riffing." The district court disagreed, recognizing that Ohio's reduction-in-force statute, as interpreted by the state courts, provides no due process and operates to negate any claim of entitlement to continued employment where staff reductions are necessitated by enrollment declines.[97]

Under South Dakota law, a continuing contract teacher dismissed for cause would be granted a right to notice and hearing. In constructing its RIF policy, a school board incorporated the due process elements of the statute but failed to grant hearings to dismissed teachers on the grounds that the statutory right to a hearing was inapplicable when discharge was solely for economic reasons. The Supreme Court of South Dakota rejected this argument, holding that once the board adopted a policy granting hearings on staff reductions of continuing contract teachers the board must follow the policy.[98]

2.5c Selection of Employee

The Supreme Court of Pennsylvania reviewed the suspensions of two teachers whose positions were eliminated due to a decrease in student enrollment in the district. Under a system that has since been legislatively repealed,[99] professional employees could be suspended by weighing seniority and employee ratings in a formula which added a point to each employee's unweighted efficiency rating for each year of service in the school district. A "substantial difference" in unweighted efficiency ratings between employees would justify weighing the employee's rating by years of service to determine the employee to be "riffed." Under the Pennsylvania law, if no "substantial difference" in employment ratings was found, years of service alone would be determinative of which employee to "rif." In the case of one teacher the high court sustained a hearing officer's finding of fact, based upon credible testimony, that for purposes of reduction-in-force a difference of sixteen points out of a possible 160 points would constitute a substantial difference, and reinstated the teacher who had been "riffed" following the district superintendent's determination that eight points were sufficient to constitute a substantial difference. The second teacher was also reinstated after the court determined no anecdotal records nor classroom observations were part of the rating procedure and held, as a matter of law, that efficiency ratings which are unsupported by anecdotal records violated the regulations established for use of ratings set by the State Department of Public Instruction.[100]

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[95] CAL. EDUC. CODE § 44955 (West).

[96] California Teachers' Ass'n v. Board of Trustees of Goleta Union School Dist., 182 Cal. Rptr. 754 (Cal. Ct. App. 1982).

[97] Lacy v. Dayton Bd. of Educ., 550 F. Supp. 835 (S.D. Ohio 1982).

[98] Ward v. Viborg School Dist. No. 60-5, 319 N.W.2d 502 (S.D. 1982).

In a case that focuses on a school board's previous bad faith relative to racially discriminatory hiring practices, the Boston School Committee was under a court order to desegregate but was experiencing a financial crisis. Layoffs were compelled, but the school committee faced conflicting obligations: layoffs based on collective bargaining agreements emphasized seniority, which if followed would violate court-ordered desegregation orders to maintain the then current percentage of black faculty and staff. The school committee decided to conduct layoffs so as to maintain the percentage of black faculty, and was ordered by the federal court to conduct administrative layoffs on the same basis.

The teacher's union challenged the layoff policy, arguing that since the initial desegregation objective had been accomplished the federal courts had no jurisdiction to interfere and asserting that the preference in layoffs for black faculty constituted a forbidden racial preference. The First Circuit Court of Appeals gave strict scrutiny to the layoff policy favoring recently hired black teachers and administrators and found that a compelling need for remediation to end a previous history of racial discrimination justified the policy. The policy was held to be reasonably necessary to safeguard the achievement of desegregation realized in the preceding seven-year period. Finally, the court continued to exercise jurisdiction over desegregation policies of the school district, but noted that this was not a case in which a judicial formula had been imposed upon a resistant school board; rather, the court had substantially affirmed the policy on layoffs which the school committee had adopted. The court was not intrusive in the affairs of the local board largely because the board's interest in remedying constitutional violations was consistent with past court orders and adopted board policies to cure the effects of a formerly segregated system.[101]

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[99] *See* PA. STAT. ANN. tit. 24, § 11-1125(b) (repealed 1979).

[100] Carmody v. Board of Dirs. of Riverside, 453 A.2d 965 (Pa. 1982).

As a result of both a reduction and discontinuance of services, a California school district gave notice that the services of selected permanent teachers would not be required in the district during the ensuing school year. The teacher union argued that the district had the burden in layoff proceedings to establish a need to retain junior administrators in preference to a senior union employee with an administrative credential. The court held otherwise, recognizing that the school district must have the discretion to select its administrative personnel to meet specific board needs and ruling that the classroom teacher could not obtain an administrative position solely because the administrator's position on a teacher seniority list was junior to that of the teacher.[102]

2.5d Realignment

While a school board has broad authority to create teaching positions and arrange teaching assignments, realignments that are designed to avoid the existence of a position which could be filled by an honorably discharged tenured teacher may be deemed arbitrary and capricious. The board refused reinstatement because the teacher was not qualified to teach one course in journalism required by the redefined position. However, another faculty member, whose teaching position was exclusively comprised of English courses, was competent to teach journalism. The court regarded the simple transposition of one class in English for one class in journalism as sufficient to continue the discharged faculty members employment, and prohibited the district from implementing the realignment when it appeared clear that the courses could easily have been interchanged among existing faculty without jeopardizing any tenured teacher's rights.[103]

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[101] Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982).

[102] Palos Verdes Faculty Ass'n v. Governing Bd., 183 Cal. Rptr. 196 (Cal. Ct. App. 1982).

[103] Peters v. Board of Educ. of Rantoul Twp., 435 N.E.2d 814 (Ill. Ct. App. 1982).

In construing statutory provisions stipulating that seniority of service should guide the preference of the school board in reductions-in-force based on declining enrollment, the Supreme Court of Ohio has held that the statutory condition does not apply when a decline in enrollment within a particular course of study necessitates the transfer of a more senior teacher from that field. No decline in the actual number of teachers resulted when a senior teacher in an occupational education program was transferred to a position as a study hall teacher due to declines in the occupational program's student enrollment. The teacher's reliance on the statute to compel reassignment of a less senior teacher was misplaced.[104]

In interpreting Pennsylvania law, a school board could not be compelled to realign staff so as to permit retention of a teacher with multiple certification. The Commonwealth Court took the position that the district had properly considered the educational impact and practicability of such a realignment in determining not to retain the teacher with multiple certification.[105]

A provocative dicta with implications for bumping rights was offered by an Illinois appellate court in the course of denying a teacher's request for injunctive relief. The teacher was bumped in accordance with terms of a collective bargaining agreement when another more senior teacher's position was eliminated and the senior teacher chose the particular teacher's assignment. The teacher suffered no salary loss or loss of seniority rights in a reassignment to another school ten miles more distant from her home, thus the absence of irreparable harm led to denial of injunctive relief. However, the court observed that the bargaining agreement gave senior teachers the right to choose their particular assignments upon the elimination of their positions and noted that such a contract provision might unlawfully restrict the school board's statutory authority to transfer teachers.[106]

2.5e Call-Back Rights

Under Minnesota statute law, a formerly full-time teacher is not considered fully reinstated upon being given a part-time position. After being placed on unrequested leave of absence, the male physical education teacher accepted a part-time position in the district. When a part-time position instructing girls' physical education became available, the school district denied the position to the part-time male teacher who possessed appropriate certification and seniority. The Supreme Court of Minnesota ruled that the legislature's intended meaning of "reinstate" meant that a school district must make positions comparable in size to the positions lost available to teachers on unrequested leaves of absence due to reduction-in-force.[107]

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[104] Bohmann v. Board of Educ. of West Clermont, 443 N.E.2d 176 (Ohio 1983).

[105] Godfrey v. Penns Valley Area School Dist., 449 A.2d 765 (Pa. Commw. Ct. 1982).

[106] Wilfong v. Collinsville Commun. Unit School Dist., 438 N.E.2d 225 (Ill. Ct. App. 1982).

In an action requesting mandamus to compel rehiring, a California appeals court required reconsideration of a board's employment decision when a laid-off teacher's preferential reemployment rights were violated. The appellate court found that the board's decision not to hire the more senior teacher was predicated on insufficient teaching experience at the middle school level and on insufficient academic preparation in physical science. While the latter consideration was a permissible qualification for the exercise of board discretion in rehiring, the imposition of prior teaching experience at the middle school level was not previously a prerequisite for hiring at the middle school level, violating a California recall provision which stipulated that the board could impose no requirement which was not imposed upon other employees who were continued in service.[108]

Because of declining enrollment, a Minnesota school board eliminated four secondary school principal positions and demoted the employees to assistant principals. Following board adopted rules, each principal was demoted in inverse order of employment as principals. On appeal of the board's determination the Minnesota Supreme Court held that the statute on employee discontinuance and preference for rehire should be governed by years of employment in the district as a teacher in any capacity.[109]

2.6 CONTRACTUAL DISPUTES

2.6a Board Policies and Contract Stipulations

Under Illinois law, a tenured teacher is not required to accept an offer of a new contract, nor is the teacher impliedly considered to have accepted a new contract solely because he or she continues teaching duties. Under the school board's authority to make employment agreements, a local board prepared a contract which provided for liquidated damages in the event of an unexpected resignation. While the board's authority was sustained, the court held that a tenured teacher could not be bound by the liquidated damages provision because he had not consented to the contract modification and was considered to be continued under the terms of his contract for the previous year.[110]

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[107] Walter v. Independent School Dist. 457, 323 N.W.2d 37 (Minn. 1982). *See also* Walter v. Board of Educ. of Quincy, 442 N.E.2d 870 (Ill. 1982) (suspended teacher's statutory right to have tenured to him or her any new position for which qualified).

[108] Martin v. Kentfield School Dist., 184 Cal. Rptr. 566 (Cal. Ct. App. 1982).

[109] McManus v. Independent School Dist., 321 N.W.2d 891 (Minn. 1982).

A Mississippi school board's adoption of salary supplements to create incentives for teachers was held permissible and was not modified by court order since it was established that district teachers had knowledge of the computations to be used for granting incentive pay and there was no evidence of mutual mistake, fraud or illegality when the teachers initially entered into the contract of employment.[111]

A contract provision that denied seniority credit for substitute service was upheld under New York law when the petitioning teachers failed to establish that the provision was manifestly contrary to public policy.[112]

A Connecticut teacher charged that the school board had dismissed her without cause and, alternately, had breached the leave agreement of her employment contract. In reliance on the agreement the tenured teacher had taken a sabbatical in which she took courses in library science. When she returned to school, a dispute over her assignment resulted when she was offered a position as a librarian or science teacher at schools other than the school at which she was originally employed. The Supreme Court of Connecticut upheld a jury verdict awarding the teacher $124,180 in damages, under the breach of contract claim, but refused to enjoin the board's dismissal of the teacher.[113]

A contract may be considered breached when one part acts unilaterally to change a material element of the original agreement. Under a negotiated agreement, the school district agreed to a salary schedule for a school year beginning August 23 and continuing for 180 days. Following the negotiations, the school board unilaterally altered the starting date of the school year. The change resulted in the loss of five working days and reduced teachers' salaries under a salary computation formula devised by the board. Although authorized by law to change the starting date of the school year, that authority would not enable the board to avoid liability for contract breach where the contract terms were clear and unambiguous. The appellate court concurred with the trial court's judgment that the board's unilateral act of changing the starting date had effectively denied compensation under the terms of the negotiated agreement and the board was liable for the salary losses plus interest.[114]

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[110] Arduini v. Board of Educ. of Pontiac, 441 N.E.2d 73 (Ill. 1982).

[111] Weatherford v. Martin, 418 So. 2d 777 (Miss. 1982).

[112] Wiener v. Board of Educ. of East Ramapo, 455 N.Y.S.2d 828 (N.Y. App. Div. 1982).

[113] Cahill v. Board of Educ. of City of Stanford, 444 A.2d 907 (Conn. 1982).

In a similar case from Illinois, a board of education was held to have exceeded its discretionary authority in adding an uncompensated work day to make up for Hostage Day, a legal holiday declared by the President of the United States. Although Illinois law grants substantial discretion to the local board in setting the school calendar, the state legislature had reduced the mandatory minimum number of school days to allow for the Hostage Day holiday. The Illinois appellate court ruled that teachers were entitled to an additional day's compensation for working a day added by the board to make up for the legal holiday.[115]

De facto dismissal was recognized by an Oregon appeals court after a determination that the tenured teacher's resignation was never formerly accepted prior to the time it was effectively withdrawn by the teacher. The board's belated acceptance of the teacher's resignation and refusal to allow the teacher to continue in employment was a dismissal which came within the jurisdiction of administrative agency review.[116]

The contract of employment between a teacher and the local Georgia school board stipulated that the employee could not resign without the local board's consent and added that resignation without board consent would authorize the local board to recommend a year's suspension of certificate. The local board refused to accept the teacher's resignation, sought to hold a hearing, dismiss the teacher for immorality and recommend revocation of certification. On appeal, the teacher invoked the contract provisions which limited the board to recommend suspension for a year due to wrongful termination of contract. The state board's decision sustaining the teacher's position was affirmed on appeal and the appellate court directed that the local board must confine its action to proration of salary for the period served prior to the resignation, recommendation of the one-year suspension of certificate, and a letter of reprimand to be placed in the teacher's personnel file.[117]

A Colorado elementary school principal who was not renewed based upon unsatisfactory performance evaluations contended that he was transferred to a position as a classroom teacher rather than demoted.

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[114] Monroe Cty. Commun. School v. Frohliger, 434 N.E.2d 93 (Ill. Ct. App. 1982).

[115] Purn v. Board of Educ., 437 N.E.2d 33 (Ill. 1982).

[116] Pierce v. Douglas School Dist. No. 4, 653 P.2d 243 (Or. Ct. App. 1982).

[117] Cobb Cty. Bd. of Educ. v. Vizcarrondo, 293 S.E.2d 13 (Ga. Ct. App. 1982).

The district had offered the former administrator a contract as a classroom teacher, but he sued for damages and reinstatement under provisions of an agreement between administrators and the school district which stipulated that the district must give reasons for the transfer of an administrator. The court found that the agreement did not apply to the former principal, holding that his demotion to a teaching position was not encompassed by a contract provision for notice and reasons in a transfer from one administrative position to another.[118]

Where a collective bargaining agreement precludes sick leave and maternity leave from being counted towards seniority, a teacher may not rely on inaccurate statements by her principal that he did not think there would be a problem with seniority. The Massachusetts teacher was not renewed due to declining enrollment and lack of seniority following her maternity leave, and the court refused relief, pointing out that the written contract governed the matter, and the principal's comments were not authorized by the school board.[119]

A teacher who was granted leave and left employment in January due to medical reasons was requested to produce documentation of satisfactory mental health by the following August. The teacher's failure to respond to this request resulted in a board resolution treating that failure as a resignation. When the teacher appealed, post-termination hearings were held and dismissal was justified upon submission of unsatisfactory performance ratings, testimony detailing lack of classroom control and failure to follow school rules. The Pennsylvania Commonwealth Court held that the post-termination procedure sufficient to insure adequate due process and ruled that the teacher's contract was effectively terminated by mutual consent when the teacher made no effort to contact the school and preserve the employment relationship.[120]

2.6b Administrative Regulations and Statutory Provisions

Under the terms of a Michigan collective bargaining agreement, a teacher could take a leave of absence but failure to notify the school district office of an intent to return would be considered a voluntary resignation. Under provisions of the state law, however, a tenured teacher could not be denied continuing tenure solely by taking a leave of absence, nor could termination of a tenured teacher take place without mutual consent. The school district sought to terminate a tenured teacher on leave of absence when the teacher failed to notify the board of her intention to return within a contractually established deadline. The appellate court took note of the fact that the district failed to advise her of the contractual requirement to notify the board of an intent to return and concluded that the teacher's effort to immediately notify the board of that intention once she received notice that the statutory deadline had passed was evidence that the teacher did not consent to termination and had not in fact resigned her tenured position.[121]

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[118] Marsh v. St. Vrain Valley School Dist., 644 P.2d 41 (Colo. Ct. App. 1982).
[119] Burton v. School Commun. of Quaboag, 432 N.E.2d 725 (Mass. Ct. App. 1982).
[120] Bruckner v. Lancaster Cty., 453 A.2d 384 (Pa. Commw. Ct. 1982).

A full-time teacher within the meaning of the Arkansas statutes cannot be denied the minimum salary due to teachers because of a written contract for a lesser amount.[122]

In interpreting statutory provisions for sabbatical leaves which permit one leave after seven years of service, a Pennsylvania appellate court ruled that a prior leave may not be counted towards the next ensuing sabbatical because computation of service required under statute begins only when the prior leave is completed.[123]

An Illinois administrative aide returning from sabbatical leave was not entitled to the same position he left under the provisions of a statute providing that a teacher, principal or superintendent shall be returned to a position equivalent to that formerly occupied.[124]

An Indiana school principal who sought mandamus to compel reinstatement to a position abolished due to declining enrollment was successful in establishing that the board's failure to provide timely notice was a breach of the employment contract and applicable state statute law, but mandamus was denied where a remedy compensating in monetary damages for the breach of contract was available.[125]

A county school superintendent's nomination of his wife, a teacher, to a position in the school district's central administration was held violative of the West Virginia antinepotism law.[126]

In response to a request for a declaratory judgment subsequent to a report of suspected child abuse filed against a school teacher, a Pennsylvania court has ruled that public school teachers are not subject to the regulations or provisions of the Pennsylvania Child Protective Services Law.[127]

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[121] Board of Educ. v. Cunningham, 317 N.W.2d 638 (Mich. Ct. App. 1982).

[122] Marvel v. Coal Hill Pub. School Dist., 635 S.W.2d 245 (Ark. 1982).

[123] Pennsbury School Dist. v. Walker, 447 A.2d 1089 (Pa. Commw. Ct. 1982).

[124] Thrash v. Board of Educ., 435 N.E.2d 866 (Ill. 1982).

[125] State *ex rel.* Cleary v. Board of School Dirs., 438 N.E.2d 12 (Ind. Ct. App. 1982).

[126] West Virginia Educ. Ass'n v. Preston Cty. Bd. of Educ., 297 S.E.2d 444 (W. Va. 1982).

[127] Pennsylvania State Educ. Ass'n v. Commonwealth, 449 A.2d 89 (Pa. Commw. Ct. 1982).

2.7 TENURE

2.7a Probationary Period

A New York court ruled that a teacher had fulfilled the necessary three-year probationary period for award of tenure despite employment as a regular substitute and time lost due to revocation of license for a three-month period from June 30 to August 9, 1979. Unique to the question of credit for substitute service was the fact that the teacher had performed the same duties in her substitute role as when serving as a probationary teacher.[128]

New York law permits a teacher to receive tenure-earning credit during the probationary period for satisfactory service as a regular substitute. However, a probationary teacher who sought credit for one and one-half years of prior substitute service was required to serve the full three-year period of full-time probationary status when it was determined that his substitute service as a teacher of secondary science was undisputedly unsatisfactory.[129]

Under the New Jersey statute, tenure rights are not available to substitute teachers, but would include teaching staff members who work in positions requiring certification, possess the appropriate certification and have served the requisite probationary period. In a New Jersey Supreme Court ruling, remedial and supplemental teachers hired at an hourly wage to provide special education services for local school districts were qualified for tenure. Specifically overruling a previous decision which excluded Title I teachers from the application of the tenure law if their contract specified "temporary employment" the court ruled that a contractual provision could not be interpreted to waive a grant of tenure governed by statute rather than contract.[130]

In determining that a teacher had not met the statutory mandate of "two consecutive years of employment" in a school district, the Supreme Court of Kansas ruled that a gap of one month in which the uncertainty of federal funding had delayed a probationary teacher's employment defeated her claim to tenure. Although the teacher had begun employment the previous year, she was not rehired for a second year until late September of a school year which began in August. This one month gap in employment meant that the tenure "time clock" had to be reset, as consecutive service could not include the year of employment prior to the gap.[131]

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[128] Pascal v. Board of Educ., City of New York, 454 N.Y.S.2d 772 (N.Y. Sup. Ct. 1982).

[129] Robins v. Blaney, 451 N.Y.S.2d 853 (N.Y. App. Div. 1982).

[130] Spiewak v. Rutherford Bd. of Educ., 447 A.2d 120 (N.Y. 1982). *See also* Lavin v. Board of Educ. of Hackensack, 447 A.2d 516 (N.J. 1982) (increase in salary based upon crediting military service is a statutory entitlement rather than an element of the employment contract). *See also* Union Twp. Teachers Ass'n v. Board of Educ., 447 A.2d 524 (N.J. 1982).

Under Oregon statute a probationary teacher may be dismissed at any time during the probationary period for any cause considered in good faith sufficient. In contrast, permanent teaching status, conferred after not less than three successive school years, includes the right to a full evidentiary hearing and review of a dismissal. A teacher in his third year of probation was initially advised that he would be reemployed for a fourth year on April 1, but was dismissed on May 19, five days before the end of the third school year. The appellate court held that notice of renewal did not confer permanent status and termination prior to the end of the third year with minimal due process was permissible.[132]

A Maine teacher who sought a due process hearing on the nonrenewal of her teaching contract based her claim on statutory interpretation and terms of an expired collective bargaining agreement. The teacher had completed one year's service in the district, voluntarily left her position in the district and then returned five years later to teach another subject at another grade level. In inferring a requirement of two consecutive years of service before an entitlement to a continuing contract guaranteeing a right to hearing, the Supreme Judicial Court of Maine presupposed that consecutive years was essential to a district's effective evaluation of teacher competence.[133]

The statute law of West Virginia has been interpreted to grant continuing contract status to auxiliary and service personnel of a school district after three years of acceptable employment. A written contract is not considered essential once the employee completes the three years of acceptable service, but a critical factor in determining continuing contract status involves the local board's treatment of the employee, particularly the board's allocation of funds from funding sources. In applying this notion the Supreme Court of Appeals of West Virginia has held that employees funded exclusively by Comprehensive Employment Training Act funds would not, solely by virtue of the funding source, be entitled to the due process protections afforded the continuing contract auxiliary personnel.[134]

An Alabama appellate court, in interpreting the point at which tenure vests for supervisory personnel, has held that a statutory provision requiring the supervisor to serve three consecutive years before attaining continuing service status does not require that the employee be hired for a fourth consecutive year in order for tenure rights to vest.[135]

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[131] Schmidt v. Unified School Dist. No. 497, 644 P.2d 396 (Kan. 1982).

[132] Wesockes v. Powers School Dist. No. 31, 646 P.2d 68 (Or. Ct. App. 1982).

[133] Lane v. Board of Dirs., 447 A.2d 806 (Me. 1982).

[134] Bonnell v. Coffman, 294 S.E.2d 910 (W. Va. 1982).

The right to tenure is generally controlled by state statute, but interpretation of the statutory language may vary. Missouri courts, taking cognizance of the express wording of the state's "*Teacher* Tenure Act" (emphasis added), have held that the law plainly contemplates only situations involving permanent teachers. While a teacher might qualify for tenure, be promoted to a principalship and retain tenure in the school district, it would not be possible to obtain tenure solely on the basis of performance as an administrator.[136]

2.7b Tenure by Default or Acquiescence

A New York principal was held to have acquired tenure by estoppel when it was determined that the school board had acquiesced in the administrator's continued service beyond the three-year probationary period despite reassignment in which the administrator continued to receive a principal's pay and perform duties similar to that of a principal.[137]

2.7c Tenure Status

A Kansas appellate court has ruled that a tenured teacher does not lose the due process privileges of tenure even if he or she resigns to accept a teaching position in another district. In construing the Kansas statute granting tenure, the court found nothing to proscribe cessation of tenure upon resignation. Absent such a proscription, a tenured teacher who resigned and was subsequently reemployed at the school district's discretion was entitled to due process and/or reinstatement when the board voted not to renew his contract.[138]

Under the provisions of New Mexico tenure laws, a certified school instructor who previously acquired tenure rights as a school instructor loses those rights as a result of being reemployed for the next consecutive school year as a district administrator. The specific case involved a district superintendent who was held to have abandoned his tenure status as an instructor when he assumed the management role.[139] However, Florida permits a limited exception to this policy by specifically exempting continuing contract teachers who resign to accept positions as "educational consultants" with cooperative education program.[140]

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[135] Wooten v. Alabama State Tenure Comm'n, 421 So. 2d 1277 (Ala. Civ. App. 1982).

[136] Meloy v. Reorganized School Dist., 631 S.W.2d 933 (Mo. Ct. App. 1982), and Fuller v. North Kansas City School Dist., 629 S.W.2d 404 (Mo. Ct. App. 1981).

[137] Orshan v. Anker, 550 F. Supp. 538 (E.D.N.Y. 1982).

[138] Arneson v. Board of Educ. of Unified School Dist. No. 236, 652 P.2d 1157 (Kan. Ct. App. 1982).

[139] Atencio v. Board of Educ. of Penasco, 655 P.2d 1012 (N.M. 1982).

2.8 CERTIFICATION

2.8a Certification Standards

Indiana law has been interpreted to require that teachers be licensed or certified pursuant to uniform, statewide standards. This public policy was judicially reviewed when a school district terminated an uncertified teacher midway through the school year. The court held that despite the district's knowledge that the teacher was not licensed the district board would not be estopped from raising the invalid contract as a defense to wrongful termination.[141]

Under New York law a teacher who is not certified by the state is unqualified and cannot be employed or paid by a public school board. Furthermore, the state commissioner of education is authorized by statute to prescribe regulations governing certification and tc award certification with approval of the board of regents. The commissioner waived a requirement for an administrative approval prior to certification in the case of a tenured teacher who had served seven years in a local distirct on the grounds that local administrators acted unreasonable in withholding a recommendation on the teacher's behalf. The local district challenged the award of certification by the commissioner as an abuse of discretion, but the New York Court of Appeals held that the award of certification was rationally based upon the commissioner's determination that the district's grant of tenure was satisfactory proof of a "recommendation" under the regulatory requirement.[142]

The Supreme Court of Wyoming has held that the state board of education is empowered by statute to administer certification of superintendents and acted within its scope of authority in denying certification to a proposed candidate for certification. Among the minimum requirements for certification, the applicant did not possess sufficient training or experience as a teacher in a recognized K-12 setting.[143]

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[140] *See* Wahlquist v. School Bd. of Liberty Cty., 423 So. 2d 471 (Fla. Dist. Ct. App. 1982).

[141] Switzerland Cty. School Corp. v. Sartori, 442 N.E.2d 702 (Ind. Ct. App. 1982).

[142] Bradford Cent. School Dist. v. Ambach, 451 N.Y.S.2d 654 (N.Y. 1982).

[143] Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681 (Wyo. 1982).

2.8b Decertification, Revocation or Suspension

A teacher who is employed by a local board and who has received tenure under Louisiana law is protected from decertification by the state board of elementary and secondary education except where fraud or misrepresentation in obtaining the certificate is involved. Conduct of a tenured teacher is under exclusive control of the local board, and since decertification for any other reason than fraudulent misrepresentation would effectively discharge the tenured teacher, an act authorizing the state board to revoke or suspend the certificate would amount to a denial of tenure. An act granting the state board this authority was struck down as unconstitutional by the Supreme Court of Louisiana on the grounds that it regulated an area protected by teacher tenure laws and under the exclusive control of local school boards.[144]

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[144] Johnson v. Board of Elementary and Secondary Educ., 414 So. 2d 352 (La. 1982)

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BARGAINING

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3.0 INTRODUCTION

Some boards of education apparently consider the duty to bargain as abhorrent as receiving Caesar's "most unkindest cut of all," and consider its realities to be no less fearsome than its anticipation. Such an attitude is not justified (or, failing that, realistic). Admittedly, collective bargaining agreements do not solve all employer-employee problems, and no board should expect that certification of a unit and the beginning of bargaining will do so, being but a small price to pay, perhaps, for the surrender of a limited number of managerial prerogatives. Nevertheless, there have been benefits to employers as well as to employees as a result of public sector bargaining. Certainly its growth since Wisconsin pioneered the idea in 1959 has been partially in response to the desire to avoid teacher strikes and other public airing of the differences between public employers and their employees. Without doubt, success has been achieved, if reduced frequency of teacher strikes is taken as the measure; whereas they once were widespread and bitter they are practically unheard of in recent years and their reduction closely parallels the growth of bargaining and impasse resolution legislation in the various states.

Despite occasional newspaper editors' trumpeting that the absence of strikes thus proves that bargaining legislation has restored "peace" to a vital public service, public sector bargaining does not actually reduce employer-employee disputes. In fact, it increases them, inasmuch as the avenues for redress of problems short of extreme action encourages filing for formal resolution of many issues that would otherwise be conceded to management. However, the forum for resolution has changed. Formerly the superintendent's office, the sidewalks, or the polling booth were the arenas for resolving differences, now the contests occur in hearing rooms, arbitrators' offices, and court rooms. Though they may be less visible than previous ones, they reflect differences neither less present nor less deep-seated than before.

This should occasion no surprise or dismay, because the purpose of collective bargaining and impasse resolution legislation never has been to eradicate differences of interest between employers and employees.

The real goal is to provide vehicles by which such differences may be articulated and resolved short of institutional disruption or unilateral exercise of the employer's economic and social power, against which individual resistance is futile. However laudable this goal may sound in the realm of ideas, school boards who have to implement it, not unlike their counterparts in the private sector, sometimes find it difficult to accommodate comfortably the investment of employees with these rights and procedures. Merely by invoking collective action, employees exert countervailing force against the traditional employer perception that the ultimately desirable work force is a labor pool made up of individuals who are both sufficiently skilled to perform needed tasks and available as needed. In sum, they should be much like other raw materials and commodities that are being transformed into products or services.

Permitting, or encouraging, employees to organize cannot, therefore, avoid struggles for power because any "gains" the employees make will inevitably be interpreted by employers as erosion of their prerogatives. It makes little difference whether the struggles are resolved by collective action such as boycotts, strikes, or other job actions; or through compulsory mediation, arbitration, and commission rulings. Either way, the employers perceive the advantage to be to labor because of the external pressure that is placed on them to accept the questionable "benefits" of various concessions rather than incur the "costs" of refusing them. Merely imposing less combative processes than strikes changes the power-exchange elements of mandated labor and management relations not at all. The threat of losing the decision to the pressure of a work stoppage or to a third party arbitrator puts pressure on employers to grant concessions, thus power shifts from its original locus to a new one.

Though such a typology is oversimple, much of the litigation regarding collective bargaining and labor relations in education during 1982 seems rooted in it. Again and again, the cases record the attempts of boards to upset awards of arbitrators or state public employee relations board (hereinafter referred to as PERBs or PERCs when Commission is the usage in the state), or of associations to consolidate or regain dearly-won power. The review that follows,[1] though not selectively done to validate the impression, suggests that many boards and associations still hold an immature view of collective bargaining and are deeply resentful of the power sharing that bargaining and binding arbitration has forced upon them.[2] Sometimes boards sue to regain lost power; other times individual employees sue to remove themselves from association domination; and it is not unusual to find associations suing boards or individuals to regain or maintain power. The possibilities for dispute seem endless.

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[1] Although this review concentrates primarily on cases in public elementary and secondary education, occasionally when extrapolation is appropriate, cases in higher education and nonschool public sector bargaining are reviewed.

3.1 CONSTITUTIONAL ISSUES

The word seems to be out that collective bargaining and other labor relations issues are not often recognized by the courts as presenting constitutional issues. Rarely, during 1982, was litigation couched in such terms; of the 161 cases reviewed, few extensively utilized state or federal constitutional rights as bases for disposition. The United States Supreme Court, however, ruled early in 1983 that a bargaining agreement granting the recognized unit exclusive access to the district's internal mailing and communications systems does not violate a competing unit's first and fourteenth amendment guarantees of free speech and equal protection of the laws. The Seventh Circuit Court of Appeals had subjected the practice to strict scrutiny and found in the affirmative. In reversing, the Supreme Court found that standard in error. (It was a 5-4 decision, with a vigorous dissent.) Rather, it reasoned, a district's mailing system is not a "public forum" in which expressive speech is broadly protected. It is, instead, a "limited public forum" in which

> not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.[3]

The Court also noted, with approval, that

> substantial alternative channels . . . remain open for union-teacher communication to take place. These means run from bulletin boards to meeting facilities to the United States Mail. During election periods, PLEA is assued of equal access to all modes of communications. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system.[4]

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[2] If politics makes strange bed-fellows, so also does the emotional reaction to collective bargaining. In 1982 the policy and resolutions committee of the Wisconsin Assocation of School Boards presented its delegate assembly with a resolution calling for the legislature to restore the right to strike to teachers.

[3] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 960 (1983).

[4] *Id.* at 959.

Educators in Florida should receive the Court's decision with much nterest for their supreme court ruled in 1982 that denying a competing rganization access to the district's bulletin boards and property or recruiting, "constitutes censorship in its most direct form."[5] In New ork, the decision should also be eagerly awaited, for there, a court has uled that such exclusive agreements are not unconstitutional, at least nsofar as complaints against them are lodged by individual teachers.[6] n Alabama, the matter arose in a different form. There, a school istrict had prohibited everybody, the bargaining agent included, rom distributing political, sectarian, or "special interest" materials ithout prior approval. Further, board policies required prior aproval of all visitors to a school building who wished to "interpet, sell, nd/or promote products or services."[7] The dispute came when these olicies were cited in denying the teachers' association access to the hools to disseminate documents and other information opposing the oard's proposal to implement a teacher competency testing program. n federal district court the association argued successfully that the olicies were overbroad and that the administration had deprived its embers of first and fourteenth amendment protections. The Fifth ircuit Court of Appeals, although affirming in part and reversing in art, upheld the teachers' request for "policies and guidelines that will ssure, as best as is humanly possible, the uniform application of riteria that will allow teachers to communicate with each other and ith their association."[8] In Michigan the principle was tested in a diferent context when public employees were found to have first amendent protection to hear views from their employers opposing the rganization of a union as well as the views of the union supporting it. he court was unconvinced that the public employer's actions contituted infringement on the union's right to freedom of association or onstituted an expenditure of funds for an unauthorized "public purose."[9]

The United States Supreme Court disposed of three labor relations in ducation cases during 1982 by dismissing one and denying review for e others. The dismissed case confirmed the decision of the Ohio

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[5] School Bd. of Dade Cty. v. Dade Cty. Teachers' Ass'n, 421 So. 2d 645, 649 (Fla. t. App. 1982).

[6] Werner v. Middle Country Cent. School Dist. No. 11, 454 N.Y.S.2d 116 (N.Y. pp. Div. 1982).

[7] Hall v. Board of School Comm'rs of Mobile Cty., 681 F.2d 965, 967 (5th Cir. 82).

[8] *Id.* at 968.

[9] Local 79 Serv. Employees Int'l Union, AFL-CIO, Hosp. Employees' Div. v. apeer Cty. Gen. Hosp., 314 N.W.2d 648 (Mich. Ct. App. 1982).

Supreme Court to uphold a teacher organization's right to obtain fair share fees from nonmembers. The state supreme court had found that the board's decision to bargain exclusively with one unit was not unreasonable, and did not deprive nonmember teachers of their property without due process of law.[10]

One of the cases denied review left standing a Third Circuit Court of Appeals ruling that administrative proceedings in labor relations such as grievance procedures, arbitration hearings, and employment relations board review are sufficiently judicial to meet fourteenth amendment procedural due process guarantees. The circuit court had concluded that

> while a state may have specified procedures that it deemd adequate, minimum due process standards are a matter of federal law. . . . Although we are not bound by a state's provisions on due process, we should not lightly override a policy adopted by its legislature and approved by its supreme court. The test is not whether the federal court could design a better scheme, but whether the state's procedures cross the threshold of minimum guarantees.[11]

The other denied case supported the practice of not permitting nonmembers of associations to vote in contract ratification elections, payment of fair share service fees notwithstanding.[12]

Though the High Court has refused to review these cases, it will undoubtedly have the opportunity to examine the issues again. Not only is there lack of uniformity among the courts on the matter of exclusive use of communications channels, but also withholding of fair share service fees has been differently received (despite the Court's 1977 ruling in *Abood* clearly sanctioning the involuntary collection of service fees from nonmember participants in bargaining units[13]). For instance, a federal district court in New Jersey has found unconstitutional a statute which permitted public employers to withhold from nonmembers' salaries, service fees that failed to distinguish between representation costs, and costs of political lobbying, and other ideological activities of the organization. The court indicated, however, that it would be proper for the state to require the payment of a service fee related solely to the costs of bargaining, which focuses on the amount of the fee rather than its mere existence.[14] In the state of Washington, on the other hand, the state law which permits common school employees to utilize payroll deductions for union activities, including political effort, was upheld though the same privilege is denied to community college teachers and other state employees. The state teachers' association cited the first and the fourteenth amendments in attempting to convince the state's supreme court to invalidate the law, arguing that not allowing the privilege to all employees, "becomes a limitation on political contributions and expenditures and therefore a regulation of speech . . . [and] takes away from public employees their First Amendment right to political speech and association as a condition of employment."[15] The court rejected the equal protection argument, finding that "community college teachers and common school teachers are two very distinct classes of employees," not a suspect classification, hence strict judicial scrutiny is not required. The freedom of speech and association claim was similarly treated: "These arguments . . . ignore the fact that state workers are not prohibited entirely from contributing to the political action committees. Rather only one method of facilitating contribution is prohibited . . . . There are many other methods of soliciting contributions."[16]

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[10] Jefferson Area Teachers' Ass'n v. Lockwood, 433 N.E.2d 604 (Ohio 1982).

[11] Pederson v. South Williamsport Area School Dist., 677 F.2d 312, 316, 317 (3rd Cir. 1982); *cert. denied*, 103 S. Ct. 305 (1982).

[12] Schreffler v. Pennsylvania Labor Rels. Bd., 427 A.2d 305 (Pa. Commw. Ct. 1981); *cert. denied*, 103 S. Ct. 84 (1982).

[13] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[14] Robinson v. New Jersey, 547 F. Supp. 1297 (D.N.J. 1982).

In both Ohio and Massachusetts constitutional issues were found in the manner required for dissenting teachers to challenge the validity of their service fees and obtain refunds. In both states, the associations demanded that teachers pay first, then exhaust internal organizational remedies prior to court or other appeals to external bodies. The Ohio case arose when dissident teachers wanted to revoke their dues checkoff authorizations. The court ruled that they were not required to exhaust the internal organizational procedures prior to filing suit in order to recover dues paid prior to the time the check-off revocation became effective.[17] In Massachusetts, the law permitted collective bargaining agreements to require teachers who were not association members to pay service fees "commensurate with the cost of collective bargaining and contract administration as determined by the Association."[18] The central issue was the association's demand that the fees first be paid, then refunds sought through internal union systems, against the teachers' desire to have the appropriate fee first established by an independent tribunal. The court strongly supported the teachers, finding that both depositing the money in the association's account and subjecting the appeal to internal procedures were constitutional violations. In plain terms it described the constitutional deficiency as follows:

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[15] Washington Educ. Ass'n v. Smith, 638 P.2d 77, 80 (Wash. 1981).

[16] *Id.* at 80.

[17] Franklin v. Columbus Bd. of Educ., 439 N.E.2d 950 (Ohio Ct. App. 1981).

[18] School Comm. of Greenfield v. Greenfield Educ. Ass'n, 431 N.E.2d 180, 182 (Mass. 1982).

> Mandating resort to the rebate procedure here would produce a further constitutional difficulty because of the requirement that the entire fee be paid to the association pending proof of legitimacy. This interim payment, as the teachers contend, not only deprives them of the opportunity to engage in expressive activities with those funds, but also forces them to subsidize the objectionable activities of the organization. . . . [T]he teachers should not be required to suffer an interim *constitutional* deprivation, while the association is deprived only of the funds to which it is entitled by statute and agreement.[19]

Disputes that seem, on their face, to be constitutional matters sometimes receive very little constitutional attention. In one such case, three teachers claimed first amendment violations arising from their transfer, allegedly in retaliation for their union activity. The court paid little attention to the constitutional issues, and based its decision on procedural grounds. Essentially it ruled that the disposition of such complaints by a public employees' relations board or commission precludes collateral filing in federal courts alleging first amendment violations.[20]

Equal protection was cited in two companion New York cases where teachers' unions attempted to obtain reversal of a public employee relations board ruling that, pursuant to state laws, dues check-off privileges could be forfeited as a penalty for engaging in unauthorized strikes. The equal protection claim was based on two assertions: (1) that teachers' unions had borne the major burden of the law's enforcement since its inception; and, (2) that the law provided two mechanisms for resolving disputes—statewide and regional PERB hearings. The court found the first to be insubstantial, and the second, it found constitutional, inasmuch as

> appellants neither constitute a suspect class nor assert a fundamental interest; hence, to withstand judicial review, challenged procedures need only be rationally related to furthering a legitimate state interest. . . . The mere fact that separate administrative procedures bodies mete out different penalties, without more, does not violate equal protection.[21]

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[19] *Id.* at 189.

[20] O'Connor v. Mazzullo, 536 F. Supp. 641 (S.D.N.Y. 1982).

[21] Buffalo Teachers' Fed'n v. Helsby; Shanker v. Helsby, 676 F.2d 28, 31, 34 (2nd Cir. 1982).

Property interests were cited by teachers in New York who were trying to recover fines imposed on them as a result of an unauthorized strike. They alleged that the administrative procedure of having a district superintendent make the initial determination of the existence of a strike and then appoint a hearing officer to consider appeals regarding the validity of the determination and the penalties to be assessed, makes the hearing defective. They also claimed deprivation of property without due process of law inasmuch as the statute provided for deduction of fines from their wages without hearings to determine individual culpability. Though the court commented that "a statutory provision whereby an adjudicator of rights reviews his own initial finding is, at best, inherently suspect on due process grounds," it found persuasive precedent which clearly barred recovery.[22] The teachers' failure to pursue vigorously the matter of being fined without a hearing was held partially the reason for the denial of their claim, although the court conceded that strong precedent indicated that no substantial federal question was involved. The case is unusual in that the court repeatedly revealed sympathy for the teachers but found itself bound by contrary precedent. Subsequent claims of a similar nature would find useful the approaches the court noted as being largely (and fatally) unexplored by the teachers. New York state constitutional guarantees of certain rights to state civil service employees were found not to apply to employees of a private security firm which held a contract with a school district. The fact that the positions had, prior to their recent abolition, been civil service was held insufficient to create the employer-employee relationship necessary to invoke the constitutional protections.[23]

In Alaska, teachers were turned back from what seemed clearly to be a violation of equal protection of the laws. Alone among state employees, common school teachers were denied both the right to strike and the resolution of impasse through binding arbitration. The state's public employee relations act created three groups of employees, giving one binding arbitration, the second a limited right to strike, and the third, the unlimited right to strike. Teachers, however, were specifically excluded from the provisions of the act. Not surprisingly, they sued. The state's supreme court cited common law precedent throughout the states which establishes clearly that, in the absence of specific legislative permission, public employees have no right to strike. Excluding teachers from the legislation was found to be constitutionally valid, inasmuch as it was substantially related to the purpose of ensuring the continuation of a government service. According to the court's reasoning, "It is permissible for the legislature to have found that teachers, although necessary to the functioning of society so as to forbid strikes, were not so essential as to require compulsory arbitration."[24]

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[22] Wolkenstein v. Reville, 539 F. Supp. 87, 94 (W.D.N.Y. 1982).

[23] Nassau Educ. Chapter of Civil Serv. Employees' Ass'n v. Great Neck Union Free School Dist., 454 N.Y.S.2d 67 (N.Y. 1982).

In the lone clear-cut constitutional victory for teacher plaintiffs against state law, graduate assistants in Florida were successful in convincing a court that their exemption from collective bargaining legislation was not related to a compelling state interest. They were permitted, under state constitutional equal protection guarantees, to organize and bargain collectively.[25]

Constitutional claims that labor relations legislation in the public sector is unconstitutional, per se, arise from time to time. For example, a Wisconsin case challenged the foundational constitutionality of the state's long-standing and pioneering municipal labor relations statute. Milwaukee County argued that the law was unconstitutional because (1) local (county) legislative matters are constitutionally required to be decided by a county board of supervisors; (2) the binding arbitration required for impasse resolution is not accountable to the electorate; and (3) the statute fails to provide for meaningful judicial review.[26]

The court applied three standards to test the claims: (1) Is the legislative purpose ascertainable; (2) are there sufficient safeguards to limit the exercise of power; and (3) are there adequate procedural and judicial safeguards? Affirming the first standard was quite easy—promoting voluntary settlement of labor disputes through collective bargaining and, failing this, resolution of impasse without resort to strikes or other work stoppages were found to be in the public interest. The second test was met by noting that the law limits arbitrators to considering only eight factors (among them, comparable settlements in neighboring districts and cost-of-living data) when making judgments. For the third, the court noted that judicial review, though admittedly limited by the law, was adequate. It commented on the necessity of preserving "the important principle of finality in labor arbitration"[27] and found that judicial review was sufficiently available via a party refusing to abide by an arbitrator's decision, hence triggering a commission hearing, the outcome of which would be appealable to judicial review. It went on to note that to accept the employer's claim, it would have to review the wisdom of the legislation rather than its constitutional validity. This, it declined to do, asserting that "a delegation of authority designed to achieve proper balance between direct political accountability and independence from the political process does not violate constitutional principles."[28]

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[24] Anchorage Educ. Ass'n v. Anchorage School Dist., 648 P.2d 993, 997 (Alas. 1982).

[25] United Faculty of Florida, Local 1847 v. Board of Regents, State Univ. Sys., 417 So. 2d 1055 (Fla. Dist. Ct. App. 1982).

[26] Milwaukee Cty. v. American Fed'n of State, Cty. and Mun. Employees, Dist. Council 48, 325 N.W.2d 350 (Wis. 1982).

[27] *Id.* at 357.

In Kansas, on the other hand, an employer was successful in convincing a court that the state's professional negotiations act did not grant the secretary of the department of human resources the power to order reinstatement of a discharged teacher. The court commented that had the legislature granted such authority it would amount to an unlawful delegation under the state's constitution. Teachers, however, were not left without an avenue of redress, for the statute provided for a series of due process hearings which were held by the court to be the exclusive remedy. The secretary's capability to determine educational policy and practice was to this extent limited.[29]

The paucity of constitutional decisions is best explained by the federal judiciary's reluctance to accept jurisdiction. In dismissing a nondues-paying teacher's claim against his association for deciding against pursuing his claim for past overtime wages all the way to arbitration because it "lacked merit," a federal district court in Florida forcefully explained when federal jurisdiction should not be invoked. (The teacher had also filed for relief in the state courts.)

> Abstention is appropriate where a state law is involved which is susceptible to an interpretation that would modify or avoid the federal issue, and resolution of the federal issue depends upon the interpretation to be given state law and the issue of state law is uncertain or unclear. . . . This Court believes that it would be placing the cart before the horse if it were to grant jurisdiction on plaintiff's federal constitutional claims that are so inextricably intertwined with the operation of the state statute in question and may be resolved in the state court proceeding now pending. . . . Its provisions are best interpreted by Florida courts. Accordingly, this Court believes it should in this instance abstain, stay its hand and not attempt to "forecast" on this potentially important issue of state law.[30]

3.2 AUTHORITY TO BARGAIN

In Ohio, where bargaining is optional, a board was not permitted to select with which of two competing units it would bargain. The problem arose when the board chose to bargain with a unit which was both more tractable (the superintendent was its president) and the choice of a minority of the employees. The court ruled that, where another employee organization exists which represents a majority of the employees, the board must negotiate therewith—if it elects to bargain at all. The voluntary provisions of the law were found not to permit a board to deny teachers the agent of their choice.[31]

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[28] *Id.* at 358.

[29] Unified School Dist. No. 251 v. Secretary of Human Resources and North Lyon Cty. Teachers' Ass'n (Kan. Dist. Ct., Lyon Cty. 1982).

[30] Galbreath v. Broward Cty. Classroom Teachers' Ass'n, 540 F. Supp. 245, 248, 249 (S.D. Fla. 1982).

Authority to bargain became an issue in Kentucky when a county board decided to bargain collectively if a poll of the employees indicated a majority to be so disposed. The poll revealed the teachers to be in favor, and the agreement that was bargained included an exclusive recognition clause. A private citizen sued, complaining that she was not permitted to participate in the process, a right she asserted arose from her status as a taxpayer. The court ruled that though the legislature had granted the board the option of bargaining, it had not granted the authority to enter into an exclusive agreement.[32] In Massachusetts an administrators' union attempted to bargain for seniority rights for two administrators demoted into the teachers' unit. The PERB ruled that one union cannot bargain for rights conferred on members of another.[33] In Oregon a court ruled that, although prior to a valid representation election an employer is under no obligation to bargain, the voluntary recognition provisions of the state's law makes ERB certification unnecessary so long as the unit recognized represents a majority of the employees.[34]

3.3 RECOGNITION OF UNIONS AND REPRESENTATION PROBLEMS

3.3a Unit Determination

3.3a(1) Supervisory, Managerial, and Confidential Employees

In Washington, a board unilaterally removed certain members from the bargaining unit mid-term in the contract. The PERC ruled that, absent a showing of "substantial changes" in the duties of a position or notice to the unit of its intentions prior to signing the agreement, the board's action was prohibited.[35]

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[31] Ohio Ass'n of Pub. School Employees v. Bexley City School Dist. Bd. of Educ., 440 N.E.2d 622 (Ohio Ct. App. 1982).

[32] Fayette Cty. Educ. Ass'n v. Hardy, 626 S.W.2d 217 (Ky. Ct. App. 1980).

[33] Massachusetts Labor Rels. Comm'n Case No. A0-4 PEB ¶ 42,708.

[34] Reynolds School Dist. v. Oregon School Employees' Ass'n, 650 P.2d 119 (Or. Ct. App. 1982).

[35] Washington PERC Case No. 2165-C-79-99 PEB ¶ 42,611.

3.3a(2) Other Issues Regarding Recognition and Representation

Recognition from time to time is disputed based on the qualifications for membership in the unit. In Michigan, a district refused recognition of a single bargaining unit for cafeteria, custodial, maintenance, and supply employees because of the wide differences in their wages, fringe benefits, and working conditions. The PERC had ruled against the district, which then litigated. The court found that the differences, though obvious, were "arguably merely the result of different bargaining histories" of formerly separate units. Consequently, ruled the court, these differences did not militate against the employees forming into a common bargaining unit.[36] A Wisconsin court of appeals has affirmed a lower court's ruling in 1981 that the state's PERC had abused it discretion by excluding intern teachers from a bargaining unit. The key to this decision is the fact that intern teachers do not function in the standard student-teacher mode. They hold full-time teaching contracts that are one semester in length.[37]

The status of part-time employees creates recognition problems as well. In Washington a board refused to recognize a unit because some of its members worked less than full time. The PERB ruled that employees who work twenty consecutive or thirty accumulated days were properly admitted to bargaining unit membership.[38] In Pennsylvania, a court ruled that long-term substitutes were properly included in a teachers' bargaining unit where it was found that sufficient community of interest existed to justify the state's PERB ruling.[39]

Who is protected by the bargaining agreement was litigated in Washington, when a half-time employee who was not properly certified was not appointed to a full-time position as required by the agreement. The court found that the agreement stipulated that the district employ only properly credentialed persons, and the plaintiff, it turned out, did not have the proper certification. Hence, he was not protected by the agreement.[40]

In Oregon, a dispute arose over whether a unit was properly certified. The state employee relations board, under a request to clarify who could be members of the unit, added new members without an election. However, the district contended that the newly constituted unit did not have to be recognized inasmuch as it had not achieved its status by election, as required by law. The court ruled that the proper way for a board to remedy a suspect unit is to refuse to bargain with it, thus inviting an unfair labor practice and subsequent administrative proceedings.[41] The importance of proper recognition and certification was underscored in a California case that found a number of employee organizations without standing to file charges of unfair labor practies against a district with the PERB. The court found that none of them had achieved, as required by law, recognition and certification as exclusive representatives hence PERB had no jurisdiction in their dispute with the district. Pending such certification, a school board was not prohibited from bargaining with all competing organizations.[42]

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[36] Lansing School Dist. v. Michigan Employment Rels. Comm'n, 324 N.W.2d 62, 65 (Mich. Ct. App. 1982).

[37] Arrowhead United Teachers' Org. v. Wisconsin Employment Rels. Comm'n, 321 N.W.2d 242 (Wis. Ct. App. 1982).

[38] Washington PERC Dec. No. 1189-A-EDUC PEB ¶ 42,763.

[39] School Dist. of Twp. of Millcreek v. Millcreek Educ. Ass'n, 440 A.2d 673 (Pa. Commw. Ct. 1982).

[40] Johnson v. Central Valley School Dist. No. 356, 645 P.2d 1088 (Wash. 1982).

In a 1980 Ohio case that was published in 1982, a court held that fifteen years of satisfactory representation were sufficient to indicate a union's adequacy as the bargaining agent even though it had never been recognized through a formal election. The court used equity to find that although thirty-six percent of the employees had requested a change in representative, this was insufficient to "require the school board to hold the requested election, there being insufficient evidence to establish that a 'significant number of employees' wished to be represented by a different union."[43]

Perhaps the most interesting recognition issue arose in North Dakota. It should receive some sort of an award for being the most unusual bargaining dispute of the year. Ms. Nancy Loney, the only teacher employed by the Grass Lake Public School District, wanted to be certified as the negotiating unit under North Dakota's employee relations statutes. The board had refused to negotiate with her under these terms, claiming that the law's definition of an appropriate negotiating unit as being a "group of teachers" excluded her from its provisions. The court agreed that there was some ambiguity as to whether the statute meant to include single employee units, but concluded that the law contained

> an implied intent by the legislature to allow all certificated teachers in this state an opportunity for negotiations. . . . [W]e will not strain to reach a contrary interpretation when there is no clear indication that single-teacher school districts are excluded merely because two or more teachers are technically a "group of teachers" whereas one teacher is not.[44]

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[41] Reynolds, *supra*, note 34 at 122.

[42] El Rancho Unified School Dist. v. National Educ. Ass'n, 180 Cal. Rptr. 809 (Cal. Ct. App. 1982).

[43] Ohio Ass'n of Pub. School Employees, v. Cincinnati Bd. of Educ., 437 N.E.2d 1210, 1212 (Ohio Ct. App. 1980).

[44] Loney v. Grass Lake Pub. School Dist. No. 3, 322 N.W.2d 470, 473 (N.D. 1982).

One advantage of the arrangement possibly overlooked by the board, which, incidentally, was willing to "meet and confer" with her is that they will have little dispute over exclusive representation practices and fair-share service fees.

3.3(b) Elections

The validity of a given election is seldom challenged all of the way into courts of record. The United States Department of Labor, however, prevailed against the Illinois Education Association in a challenge to its election procedures. The by-laws of the association guaranteed four ethnic minorities eight percent of the seats in its representative assembly and four seats on the board of directors. The Department of Labor alleged that the arrangement, even though motivated by affirmative action goals, violated the Labor Management Reporting and Disclosure Act, which requires that every election be held by secret ballot and that every member in good standing must be eligible to be a candidate for each office.[45]

From time to time, however, allegations of improper elections are made. In Washington, one was challenged on the basis of improper seating of union observers at balloting. An arbitrator ruled that inasmuch as the violation had not been called to the attention of the PERC official present at the voting, the matter was insufficient to invalidate the election results.[46] In Vermont, a problem arose when a tie vote in a two-party election occurred. The association wanted a run-off whereas the district claimed that since no unit had been designated by majority vote, there was no proper organization with which to bargain. The PERB agreed with the board, ruling that a run-off would be improper because the law limited the outcomes of a certification election where only two contenders existed, to one of but two decisions—agent chosen or agent not chosen. In a tie vote, therefore, "agent not chosen" was the only conclusion possible.[47] In Florida, an association wanted absentee ballots provided in an election for the convenience of its members. The board refused to cooperate and the PERB upheld, finding that the association failed to demonstrate that any teacher would be unable to vote at on-site polling.[48] A Pennsylvania trial court set aside a representation election when it found that the labor relations board notice of election and voter eligibility failed to reach twenty-six employees who were eligible to vote.[49] In Ohio, a trial court order that an election be held between two unions vying to represent clerical employees was overturned. Among other errors, the appellate court found inadmissable the approximately 330 authorization cards requesting a change in representation because only three employees testified as to the validity of their signatures. The court found that the procedure used to acquire the signatures did not lend itself to further verification.[50]

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[45] Donovan v. Illinois Educ. Ass'n, 667 F.2d 638 (7th Cir. 1982).

[46] Washington PERC Case No. 3339-E-81-645, Dec. No. 1139-PECB PEB ¶ 42,586.

[47] Vermont Labor Rels. Bd. Dec. No. 80-50 PEB ¶ 42,668.

[48] Florida PERC Case Nos. RC-82-009, RC-82-010; Order No. 82E-381, PEB ¶43,051.

Charges of unfair attempts to influence the outcomes of certification elections sometimes arise. Most are settled by PERB rulings, such as in a Florida case where, during a certification campaign, a school board representative posted a notice in the teachers' room stating that "some employees could lose their jobs or benefits if the union comes in."[51] The PERC ruled this to be threat, intimidation, and improper interference with the election—an unfair labor practice. On the other hand, a Michigan court has ruled that a public employer (not, incidentally, a school) may expend public time and money to express its views opposing the organization of a union. Union claims of first amendment infringement were held to be without merit. The court noted that

> first of all, it is important to recognize that no provision of the PERA contains an express or implied prohibition against the expression of views by a public employer. Therefore we are left with little indication of the Legislature's intent in this regard. The omission of such a provision may have reflected an intent to permit *broader* rights of expression than the NLRA or this omission may indicate that the Legislature intended significant restrictions on the scope of expression.
>
> Secondly, we note that the purpose of the PERA is to protect the organizational rights of employees, which include the right to organize and the right not to organize.[52]

Expressing grave doubts about the constitutionality of a statute that would prevent a public employer from expressing an opinion regarding organization of a union, the court concluded that public employers in Michigan were permitted to express views opposing union organization so long as they do so without intimidation, coercion, or misrepresentation. The conjoint rights of all parties, according to the court can be "best served by permitting the free flow of information from both

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[49] Bucks Cty. Schools Intermediate Unit No. 22 v. Commonwealth of Pa., No. 81-05329-12-8 (Pa. C.P. Bucks Cty. Ct. 1982); PEB ¶ 37,568.

[50] Ohio Ass'n of Pub. School Employees v. Cleveland City Bd. of Educ., 430 N.E.2d 1335 (Ohio Ct. App. 1980).

[51] Florida PERC Case No. CA 81-056, Order No. 82U-031, PEB ¶ 42,765.

[52] Local 79, *supra*, note 9 at 651.

both union and employer to prospective union members. Such a dynamic interplay of opposing views is most likely, in our belief, to ensure that each employee can make an informed choice on the representation issue."[53]

3.4 RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

3.4a Union Rights

Collective bargaining units devote much energy and resources to maintaining themselves in power. Agreements which guarantee that they will be the exclusive bargaining agents are, therefore, extremly important to them. Though the principle of exclusive representation is well-set, disputes between union or association rights and the rights of others are inherent in such arrangements. As reviewed in section 3.1, *supra*, these disputes generate considerable litigation regarding individual rights as opposed to organizational support. This section reviews the details of those decisions in addition to discussing non-constitutional cases to provide insight into what may be accomplished without risking constitutional or statutory challenge.

In general, exclusive agreements seem to be valid, based, as they are, not only upon statutes in realms of legitimate state action, but also upon basic concepts of democracy and majority rule. Restrictions on the activities of minority, or nonmembers, however, are quite another matter, and usually receive strict judicial scrutiny. Unless the state can show some compelling relationship to a legitimate interest, such as promoting labor peace, or the ability of the majority unit to fulfill its statutory duties and obligations to its membership, restrictions on the actions of minority groups, including dissident individuals, are unlikely to stand. Thus have minority unions been given the right to speak and utilize employer bulletin boards. In the Dade County, Florida, case discussed earlier (section 3.1) the Fifth Circuit Court of Appeals found a minority unit, the Dade Teachers' Association, on the receiving end of restrictive practices. It had been denied access to potential members by having its notices removed from bulletin boards, and its members were not permitted to enter school parking lots after school to distribute literature. These actions, though ostensibly taken by board officials pursuant to policies regarding protection of students and teachers from outside interference and to promote campus security, were actually taken at the insistence of the majority unit. The court reviewed the facts of the dispute in light of precedent both in public and private sector cases, and concluded, citing an earlier decision, that

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[53] *Id.*

> absent extraordinary circumstances, a public employer may not restrict the rights of employees to discuss organizational interests at the work site during the employees' non-work time, nor restrict distribution of literature during work except where the actual work of public employees is performed. Here, the School Board's policy precluding at all times and in all cases employees (other than UTD agents) from one job site entering another job site for purposes of soliciting other employees for membership in an employee organization is presumptively invalid.[54]

This ruling shifted the burden of proof to the school district to demonstrate that the restrictions were justified. The court's examination of the record revealed no justification, and it reviewed the facts presented with a hint of impatience and incredulity.

> While sympathetic to the School Board's concern for the safety of its students and teachers, we find that it has simply failed to show that a blanket no-access rule is the only means available, or even a reasonable means, of protecting this interest. No evidence was introduced to show that solicitation by employees from other campuses increased the schools' security problems. Indeed, the rule on its face permits solicitation by representatives of the majority union, indicating that the policy is designed to protect UTD's "exclusivity" rather than the safety of children, and is discriminatory in nature. (Although the School Board contends that security is hampered by unknown teachers at school parking lots, it does not suggest that UTD supporters are more easily recognizable than DTA advocates, thus undercutting "security interests" as a justification for the rule.)
>
> Additionally, while the school system has had increased crime problems in recent years, there is absolutely nothing in the record that ties these problems to school employees, much less teacher's soliciting union memberships. The presence of additional teachers in the parking lots after school hours would seem, if anything, to be a deterrent to crime.
>
> Appellants contend, in essence, that allowing DTA supporters to use the employee's general purpose bulletin board will endanger harmony and cause friction among employees. Aside from the irony of a union advancing such an argument, the argument proves too much. For better or worse, the law—

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[54] Dade County, *supra*, note 5 at 348.

> not to mention the First Amendment—allows public employees to communicate and solicit each other for collective bargaining purposes even though such conduct often leads to disharmony and friction.[55]

In the Alabama case also discussed earlier (section 3.1), the certified association found itself on the receiving end of restrictive practices. The association had tried to disseminate opposing position papers and organize meetings of teachers to protest the adoption of the board's planned minimum competency testing program for teachers. Some of the district's administrators had permitted the activities; some had not. On the other hand, board-sponsored testimonials for the project were widely disseminated. This practice, according to the court, effectively compromised the board's contention that the proscriptions were necessary to prevent disruption.

> The problem lies in the fact that there was no difference between the possible disruptive effects of the Board's communications and the MCEA's communications on the subject in controversy. They differ only in the positions taken. School administrators and principals may not permit one side to promote its position while denying the other side the same opportunity.[56]

Further reason to deny the practice was found in the district court's lament that "here we have college educators straying all over the field by their various interpretations of the written policies." This problem was so pervasive, noted the court, that "it should be particularly noted that the policies have not been ruled invalid because they require prior submission and prior approval. Rather, this decision turns on the fact that, as written, they do not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution."[57]

With individual dissidents, however, another matter presents itself. A New York court found that a district's refusal to grant an individual teacher access to the internal mailing system did not violate equal protection guarantees because such violations can occur only where "similarly situated" parties are treated differently. Sufficient difference was found between an individual teacher (all individual teachers wre similarly denied access) and an organization to justify the regulation, using the rational, rather than the more stringer, compelling interest standard.[58]

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[55] *Id.*

[56] Hall, *supra*, note 7 at 968.

[57] *Id.* at 969 and 971.

[58] Werner, *supra*, note 6.

In Massachusetts a union's right to decide how best to serve its members prevailed over an individual's claim that it had inadequately pursued a complaint. The court denied damages the member sought against the union for failure to pursue vigorously a grievance regarding her performance evaluations. The court cited precedent that, absent "lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights," a union's decisions on the best method of protecting an individual's interests were to be sustained.[59] A federal district court in Florida has ruled similarly, permitting the union's decision to decline pursuit of a grievance all the way through to arbitration and the board's refusal to process the individual grievance (both upheld by the PERB) to stand, pending a state appellate court decision.[60] The Fifth Circuit Court of Appeals has ruled that a teachers' association has the right, as the agent of its members, to make decisions regarding them. A teacher had claimed that direct notice to a policy-holder was necessary before any changes in coverage agreed to by the association would be properly in force. The court disagreed.[61]

An associaton's rights, however, were found *not* to extend to ownership of money in treasury of local unit that had withdrawn from affiliation. The ruling came despite the unusual method the local unit had adopted to transfer the funds to a competing organization—drawing checks to members for "negotiating" and "public relating" expenses even though everyone knew there had actually been no such expenses.[62]

3.4b Union Security

Union security is frequently reflected in the litigation that associations both initiate and receive. Such disputes most often arise from so-called fair share agreements wherein nonmembers are required to pay a service fee to the association for the costs of representation and these fees are deducted from nonmembers' salaries through mandatory dues check-off agreements. Though the concept of service fees has clearly been found constitutional by the Supreme Court, legislation establishing the procedures must be carefully drawn to avoid constitutional violations through deprivation of property without due process of law. Implementation of the practice differs widely, as does its judicial reception. The issues most in dispute are the determination of the amount of the fee to be collected, and the manner in which nonpayment is to be treated.

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[59] Tringue v. Mount Wachusett Commun. College Faculty Ass'n, 437 N.E.2d 564 (Mass. Ct. App. 1982).

[60] Galbreath, *supra*, note 30.

[61] Peel v. American Fidelity Assurance Co., 680 F.2d 374 (5th Cir. 1982).

[62] Illinois Educ. Ass'n v. Illinois Fed'n of Teachers, 437 N.E.2d 1265 (Ill. 1982).

An association in Massachusetts encountered district refusal to accede to its demand that two nonpaying employees be discharged. The association then developed an alternative plan, which was to have nonmembers pay the entire fee, then seek refunds through state and national association appeals. In exchange, the association agreed to drop its demand for the affected employees' discharge, and promised to place the fees into an escrow account under the association's control so the funds would always be available, no matter what the eventual outcome. The service fee was set at $153 per year; full dues were $158. The teachers declined the compromise and the school committee continued to refuse to discharge them. The association grieved the matter, and it eventually made its way into the state's supreme judicial court. The issues, as presented by the court did not hinge on the constitutionality of the service fee, but on the problem that

> requiring a dissenting employee to resort to the type of internal rebate procedure involved in this case . . . would undermine the burden that the Supreme Court in *Allen* and *Abood* has explicitly placed on the association of justifying the fee it assesses whenever a general obligation is entered. This burden is only meaningful if legitimacy is proved before a neutral tribunal and subjected to judicial review. An initial determination by the association followed by arbitration (before an arbitrator who may or may not be expert in organization expenses and accounting) followed by limited judicial review . . . are simply insufficient to guarantee that the onus of justification remain at all times on the association.[63]

The teachers, nevertheless, did not escape paying a service fee. The court directed that they, and any dissenting employee may be required to

> pay the disputed fee into a neutral escrow account pending adjudication . . . [and has] the option of bringing a prohibited labor practice complaint before the Labor Relations Commission if the employee wishes to challenge the fee amount. The commission may require the employee to pay the disputed fee into an escrow account, but may not require that it be paid to the organization until the commission has determined the permissible fee. Once the employee has brought a complaint, the burden of justifying the fee as permissible must rest on the organization.[64]

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[63] Greenfield, *supra*, note 18 at 188.

[64] *Id.*

In New Jersey, however, a federal district court has taken a more restrictive approach to the assessment and collection of the fees. There, the power of the state to enact legislation requiring payment of service fees was affirmed, but the law under challenge was not, because it failed to differentiate between representation costs, costs of political lobbying, and "ideological" activities of the association. The court set the standard for the legitimacy of such fees as including (1) they must not be used for political lobbying over and above lobbying designed to secure agency or legislative action required to implement a collective bargaining agreement, and (2) the association must have the burden of establishing a proper representation fee. The court was adamant about the latter, commenting that

> the more one examines the facts and the realities of the situation, the more one becomes convinced that the potential for serious constitutional deprivations will exist unless the organizations receiving the fees are required to establish in advance of payment the amount required to reimburse them for services rendered for collective bargaining, contract administration and processing grievances. The burden must be on them to establish this amount with detailed financial and other appropriate data which satisfies some impartial body capable of analyzing the data.[65]

A court in New York was similarly sympathetic to an individual's claim for an accounting of the disposition of service fees. A union's refusal to provide financial information adequate to justify the amount of refund offered a nonmember was found to be adequate basis for the PERB's ruling that required divulgence of certain financial data.[66] In Kentucky, the matter was definitively resolved by the Sixth Circuit Court of Appeals. In a lengthy decision which extensively discussed various ramifications of combining political action contributions with dues check off procedures, it upheld a district court's ruling that a reverse check-off plan of forwarding payments to the state's education political action committee does not violate constitutional rights of employees. The Kentucky registry of election finance had found the practice of automatically withholding a specified sum from dues check-off unless an employee signs a waiver of such contribution, to be in violation of the state's statute forbidding "assessment" or "coercion" in political contributions. The political action committee appealed the ensuing order to cease the practice to the federal district court, which issued an injunction against the registry because it found that the purposes of the practice were well known to all employees and that no evidence of coercive practice or constitutional violation existed.

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[65] Robinson, *supra*, note 14 at 1323, 1324.

[66] United Univ. Professions v. Newman, 446 N.Y.S.2d 596 (N.Y. 1982).

> Inertia of a person to take a step to see that his money is not being used for political purpose, does not deprive him of the right to take that step and cannot be logically interpreted by Registry as coercion. . . . There is not a shred of evidence in the record to indicate that the employment of any KEA member was jeopardized or appeared to be jeopardized by failure to contribute to KEPAC.[67]

In the absence of legislation which provides automatic fee check-off from nonmembers, associations resort to various means to produce payment. Most usual is demand for dismissal, which is often recognized by statutes and agreements as a legitimate choice to present the teachers. In California, however, an association's attempt to employ penalties short of dismissal was thwarted. It had successfully bargained the following into its agreement:

> [A]ll employees in the unit shall either join the Association or pay to the Association a service fee in an amount not to exceed the regular dues and general assessments required for membership. . . . [T]he association and not the district shall be responsible for requiring employees to fulfill their obligation.[68]

Based on this provision, it filed suit in small claims court to recover fees from nonpaying members of the unit. The small claims court ruled in favor of the association, as did a county superior court, which convened a de novo trial. The case was then transferred to the California Court of Appeals, which reversed. The court noted that the code defined organizational security in two parts: (1) that employees may decide to join, not join, or to terminate membership once joined; and (2) an arrangement which requires an employee as a condition of continued employment either to join the recognized union or pay the service fee. Taken together, reasoned the court, these definitions validated the dissenting teacher's argument that the agreement did not provide for dismissal as the penalty (as required by the statute) hence the association was foreclosed from using any other means, including filing civil suit. The court further noted that, where organizational security as defined in the statutes was made part of the agreement, the limitations of the statutory definition prevail: "[N]othing in the Rodda Act permits negotiation of a so-called organizational security agreement which is not a condition of continued employment but which purports to subject non-member employees to civil suit or any other form of what may be characterized as harrassment or possible discriminatory treatment."[69]

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[67] Kentucky Educators' Pub. Affairs Council v. Kentucky Registry of Election Fin., 677 F.2d 1125, 1129, 1134 (6th Cir. 1982).

[68] San Lorenzo Educ. Ass'n v. Wilson, 179 Cal. Rptr. 25, 26 (Cal. Ct. App. 1982).

In Ohio, a teacher attempted to avoid service fees which were set at fifty percent of a regular member's dues, by claiming that he was being forced to pay for a service that he neither wanted nor needed. Further, he claimed, the service fee violated his annual employment contract, since it had been executed prior to the board's agreement with the association requiring the fees as a condition of continued employment. The court affirmed both the association's and the board's positions, finding the agreement to bargain exclusively with one unit not unreasonable. Further, the court found that the teacher's annual contract did not bind the board against making managerial decisions that would result in changes in a teacher's take-home pay. The teacher was ordered to submit the required fees to the association or suffer the penalty, although a dissent argued that the statute did not contemplate involuntary deductions.[70]

After lengthy consideration which has included examination by both the United States and the state supreme courts and legislative modification, Minnesota's fair-share fee statute has been declared constitutional. Key to the decision was an amendment providing for prior notice of the "fair-share" amounts, and hearing procedures to determine their validity.[71]

3.4c Obligations of the Exclusive Representative

Though it may sound tautological, the exclusive representative is obliged to represent the interests of its members (broadly defined). Though it may do more, such as engage in political action, it is obliged not to do so with monies collected for representational purposes (*see supra*, section 3.4b). This obligation is not as straightforward as it might seem, however, for any organization encounters strain between its pursuit of the collective good and individual members' perceptions of their personal advantage. This occurs in union or association business when the organization refuses to pursue a grievance with all the vigor an individual might desire. Thus the obligation is not a promise to every member to pursue his or her complaint to the limit. The legal status of the individual claims as opposed to the union's obligation to pursue them was best reflected in a nonschool case wherein the court ruled that no individual employee has the absolute right to have a grievance arbitrated. Absent "arbitrary, bad faith, or discriminatory treatment," the union's decisions will be considered "fair representation."[72] Similarly, a school employee in New York was found to have no standing under his collective bargaining agreement to request arbitration for himself when the union declined to pursue the matter.[73]

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[69] *Id.* at 29.

[70] Jefferson, *supra*, note 10.

[71] Threlkeld v. Robbinsdale Fed'n of Teachers Local 872, AFL-CIO, 316 N.W.2d 551 (Minn. 1982).

3.5 SCOPE OF BARGAINING

School boards are typically reluctant to bargain any more than is absolutely necessary, partially because legislation enabling it has often been initiated or sponsored by groups favoring organized labor, and partially because limits are always placed on their duty or permission to do so—usually expressed in terms of "wages, hours, and conditions of employment." These limits, however, have not definitively clarified the scope of bargaining for the concept of "conditions of employment" is potentially so broad as to jusitfy a claim that virtually everything that influences an employee in any way whatsoever is bargainable. Neither boards nor courts have accepted such an expansive definition of the phrase, however; consequently there has developed a considerable body of decisions on what may be bargained. Out of these decisions, three things have clearly emerged: (1) Where the statutes require bargaining, boards have a duty to do so and must do so in "good faith;" (2) where bargaining is not expressly permitted by law, boards may not formally engage in it; and (3) where bargaining is merely permitted, boards may elect whether or not to participate in it, and once begun, may terminate the process at any time.

A court in New Jersey felt compelled to review the matter one more time, even though there is little doubt that by now everyone involved in public sector bargaining has heard of the three rubrics—mandatory, permissive, and forbidden subjects—which ostensibly define the scope of bargaining. It described them thusly:

> Mandatory subjects are those which the employer must negotiate if requested by employees' representative. Permissive or voluntary subjects are those which the parties may negotiate if they do not place substantial limitations on government's policy-making powers. Finally, illegal subjects are those which the parties are forbidden to negotiate because the subject matter is controlled by other statutes or regulations that permit no discretion on the part of the employer.[74]

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[72] Jarnigan v. Teamsters' Local 519, 548 F. Supp. 25 (D. Tenn. 1982).

[73] East Ramapo Cent. School v. Symanski, 456 N.Y.S.2d 22 (N.Y. App. Div. 1982).

[74] Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 448 A.2d 487, 489-490 (N.J. Super. Ct. App. Div. 1982).

3.5a Duty to Bargain

Attempts to escape statutorily-established duty to bargain by attacking the constitutionality of the legislation itself were reviewed in section 3.1; there seems little chance that such efforts will succeed. The current attitude of courts toward allegations of disparity between various constituional principles and legislation enabling public sector bargaining was well-described by the Supreme Judicial Court of Massachusetts which simply asserted that "it is our duty to construe statutes so as to avoid such constitutional difficulties if principles of good interpretation permit it. . . . Where the draftsmanship of a statute is faulty or lacks precision it is our duty to give the statute a reasonable construction."[75] A federal district court in Florida adopted the same stance, stating that where labor disputes are "susceptible to resolution so as to render unnecessary a decision of the federal constituional questions. This Court will not at present decide plaintiff's constitutional claims on their merits."[76]

Consequently, questions regarding the scope of bargaining are resolved largely through examination of statutory law and the common law duties which arise from enabling legislation. The latter essentially comprise the definition of "good faith" bargaining, which usually is interpreted to refer to the willingness of both sides to discuss a subject, to make reasonable concessions to the other, to refrain from interfering with the other side's decision-making, and to abide by an agreement, once made. Not fulfilling a duty to bargain, therefore, can appear in the form of simply refusing to meet, or in taking actions which influence the proceedings in such a way as to discourage agreement, or both. In California, a board did both. It refused to reopen negotiations after impasse had been reached and a fact-finding report issued. It also unilaterally implemented a salary package that was substantially different from the last offer it had introduced prior to impasse. Its position was based partially on the law, which defined duty to meet and negotiate in terms of requiring the parties to "begin negotiations prior to the adoption of the final budget . . . so that there is adequate time for agreement to be reached, or for the resolution of impasse." The board claimed that since the budget deadline had passed, the duty to bargain no longer existed. It also claimed the invocation of fact finding to be a signal that negotiations were at a nonrevokable impasse. The teachers shortly went on strike, and both sides filed for unfair labor practice rulings with the state's PERB. The ensuing investigation resulted in the issuance of an injunction against the board's refusal to reopen bargaining conditioned on the teachers returning to work. The district appealed and learned that the California Court of Appeals was highly supportive of the law's intent that labor disputes be settled through bargaining, not litigation:

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[75] Greenfield, *supra*, note 18 at 186.
[76] Galbreath, *supra*, note 30 at 248.

> Under district's rationale, as soon as mediation and fact-finding are completed, the duty to negotiate in good faith evaporates. We find no authority supporting this contention nor do we find any authority which would compel us to implement section 3549 giving district the right to refuse to bargain after post-fact-finding concessions made by Association.[77]

The appellate court also found the district's implemented salary package sufficiently different from its last offer to constitute a violation of the principle that

> an impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the employer is no longer free to implement changes in working conditions without bargaining.[78]

In Delaware, an employer tried to avoid bargaining by refusing to continue discussions with a unit that had a petition for reorganization pending. The court ruled that the employer was required to bargain with whatever certified unit existed at the time. What might or might not be the outcome of a reorganization petition had no bearing whatever on the unit's current legitimacy.[79] A board in Indiana was found to have no duty to bargain an issue that affected only one teacher. The association had tried to inject the nonrenewal of the teacher into contract negotiations, citing the statutory mandate to discuss "selection, assignment or promotion."[80] Duty to bargain was extended by a Maine court to include the employer's obligation to notify a union of its willingness to bargain if the subject was a mandatory subject of bargaining.[81]

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[77] Public Employment Rels. Bd. v. Modesto City Schools, 186 Cal. Rptr. 634, 646 (Cal. Ct. App. 1982).

[78] *Id.*, *citing* Gorman, *Labor Law* (1976) at 449.

[79] Council 81, AFSCME v. State Dep't of Health and Social Servs., 449 A.2d 271 (Del. Super. Ct. 1982).

[80] Indiana Educ. Employment Rels. Bd. v. Carroll Consolidated School Corp. Bd. of Trustees, 439 N.E.2d 737 (Ind. Ct. App. 1982).

[81] City of Bangor v. American Fed'n of State, Cty., and Mun. Employees Council 74, 449 A.2d 1129 (Me. 1982).

3.5b Interrelationship with Other Laws

The inherent complexity of bargaining and the fact that, over the years, many bargainable topics have received direct legislation leads to continuing conflict between bargaining statutes and other laws. Perhaps the chief source of interrelationships and conflict, though by no means the most clearly delineated, is the inherent incompatibility between traditional broad grants of authority to boards to manage the schools, and the subsequent limits placed on that authority by the sharing of power inherent in collective bargaining. When a board agreed to layoff procedure that reduced its discretionary power to transfer teachers, a court in Illinois expressed the matter thusly: "[W]hile a school board may enter into a collective bargaining agreement with a teachers' union, the board cannot, by such an agreement, delegate or limit its statutory powers and duties."[82] A New York court ruled similarly, finding that, provisions of the agreement notwithstanding, an arbitrator exceeded his authority when he directed the board to reinstate a grievant to a position from which the board had transferred him.[83] Cases where certification or tenure are involved are other examples of areas where such agreements are not typically permitted. Here, the common law that public employers and employees may not agree to contractual terms that contravene specific terms or conditions of employment set by statute prevails. A New Jersey court ruled specifically that Title I and other nonlocally funded teachers cannot be denied tenure by terms of the collective bargaining agreement: "The legislature has explicitly mandated that teachers be granted tenure under certain conditions as a means to improve public education. Neither school boards nor teachers are free to disobey that mandate. Tenure is not dependent on agreement betwen the parties."[84] In California, a section of a collective bargaining agreement providing certain qualifications for extended sick leave benefits was found in conflict with the education code and was severed.[85] In Wisconsin, the limitation on bargaining topics that are covered in statutes is so well recognized that legislation implemented in 1982 grants expressed permission that a "collective bargaining agreement may modify, waive, or replace" any provisions of the state's nonrenwal, dismissal, and tenure legislation.[86]

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[82] Wilfong v. Collinsville Unit School Dist. No. 10, 438 N.E.2d 225, 228 (Ill. 1982).

[83] Sweet Home Cent. School Dist. v. Sweet Home Educ. Ass'n, 455 N.Y.S.2d 685 (N.Y. App. Div. 1982).

[84] Spiewak v. Board of Educ. of Rutherford, 447 A.2d 140, 149 (N.J. 1982).

[85] Jefferson Classroom Teachers' Ass'n v. Jefferson Elementary School Dist., 187 Cal. Rptr. 542 (Cal. Ct. App. 1982).

[86] Wis. Stat. §§ 118.22(4), 118.23(5) (1982).

Nevertheless, "being in conflict with" is not always deduced simply because a collective bargaining agreement is at variance with the statutes. In Pennsylvania, a court ruled that the school code's grant of authority to boards to "make such regulations as they may deem necessary to make sure that employees on leave shall utilize such leave properly," was found insufficient to permit it to change unilaterally its past practices regarding sabbatical leaves. The court found that "the power to make regulations pertaining to leave policy is not tantamount to a statutory declaration that the area is removed from bargaining."[87] Also in Pennsylvania, it was found that the provisions of the school code were not dispositive of employee status under the state's employee relations act. The PERB was permitted to consider as "merely one factor" the distinction in the code between permanent and substitute teachers in deciding whether the two groups of teachers could both be members of the same bargaining unit.[88] A collective bargaining agreement in Ohio which placed a ten-day time limit on revoking dues deduction authorizations was found not to be in conflict with a general statutory provision assuring individuals of the right to revoke such authorizations.[89]

Open meetings laws and various other kinds of sunshine legislation frequently conflict with the tradition in collective bargaining that negotiation is best conducted away from public view. In Tennessee, a lower court enjoined bargaining in closed session, citing the state's sunshine law. Both the board and the association appealed, each having filed charges against the other for violation of that law, among other things. Though the finding of the appellate court was based largely on jurisdictional rather than substantive rationale, it ruled that the teachers' association was not a "governing body" under the terms of the law, hence was not bound by its disclosure provisions, and that the association had no standing to challenge the district's conduct under the law. Thus, the fundamental issue of whether a board can conduct negotiations and planning for them in private was not reached.[90] Planning for bargaining, rather than bargaining, per se, was the issue in Minnesota where it was found that the superintendent of schools was not a member of the board for purposes of the open meetings law, and that a private meeting of the board to prepare for a scheduled session with a state mediator was a reasonable exception to the law's general mandate that negotiations be held in open meeting, except "where otherwise provided by the director."[91] A board in Maryland broke its tradition of sequestered bargaining by unilaterally deciding to conduct negotiations in open meetings. The education association objected on the ground that the board's action constituted a violation of the duty to bargain in good faith, but both the trial and appellate courts upheld the board's action, noting that although the law "authorizes the board to conduct its negotiations with the association in closed session; it in no way requires closed sessions. Under the statute, adjournment of an open meeting into closed session is at the option of the public body, in this case, the board." Departing from its usual rule of eschewing decisions on subjects not raised or argued in trial court, the court considered the related question of whether collective bargaining sessions constituted "meetings of a public body" as defined in the state's open meeting law. It concluded that the quasi-legislative function of such sessions was sufficient to bring them under the definition of "meetings" in the law, and ruled that "the provisions of the Open Meetings Law are applicable, whether it is the board or its authorized representatives that convene to engage in collective bargaining negotiations."[93] Florida's Sunshine Act was held sufficient to prevent enjoining a newspaper reporter from attending a grievance arbitration hearing. All documents, ruled the court were by statute available to the reporter, hence no irreparable injury could be discerned from allowing public access to the oral testimony regarding it.[94]

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[87] School Dist. of City of Erie v. Erie Educ. Ass'n, 447 A.2d 686, 689 (Pa. Commw. Ct. 1982).

[88] Millcreek, *supra*, note 39 at 675.

[89] Franklin, *supra*, note 17.

[90] Chattanooga Bd. of Educ. v. Chattanooga Educ. Ass'n, No. 471 (Tenn. Ct. App. 1982); PEB ¶ 37,639.

Though it would seem well settled, from time to time the question of applying federal labor relations laws to state and local public employees arises. The Supreme Court of North Dakota flatly reminded complaining employees of the Bismarck School District that "the federal labor relations laws do not apply to public employees."[95] The teachers had unsuccessfully sought judicial imposition of certain benefits they had failed to achieve through negotiations. Similarly, in New York, a teacher was found to have no right under the National Labor Relations Act to file exceptions to findings of an administrative proceeding.[96] However, a California court reminded litigants that "precedent developed under the NLRA is applicable in cases arising under the state laws where 'parallel conflicts' between the court and the state agency arise regarding pre-emptive jurisdiction."[97]

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[91] Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982).

[92] Carroll Cty. Educ. Ass'n v. Board of Educ. of Carroll Cty., 448 A.2d 345, 348 (Md. 1982).

[93] *Id.* at 351.

[94] Palm Beach Cty. Classroom Teachers' Ass'n v. School Bd. of Palm Beach Cty., 411 So. 2d 1375 (Fla. Dist. Ct. App. 1982).

[95] Webster v. Bismarck Pub. School Dist. No. 1, 321 N.W.2d 98, 99 (N.D. 1982).

[96] Giacalone v. National Labor Rels. Bd., 682 F.2d 427 (3d Cir. 1982).

3.5c Proposals Within Mandatory Scope of Bargaining

The standard trichotomy of bargaining scope—mandatory, permissive, or illegal—does not definitively establish any given topic's bargainability, because even though a subject may clearly be prohibited, bargaining the impact of board decisions regarding it may be mandatory. Making educational policy, for instance, is clearly well within a board's obligation to manage the schools, hence, not bargainable. Yet, the impact of such policy decisions on the wages, hours, or working conditions of employees is consistently found bargainable. A Florida case illustrates: A court found that class size and staffing levels sufficiently touched standards of service offered to the public, to require that they be "unilaterally established by the district." Bargaining the impact of such decisions, however, was not precluded.[98]

Unfortunately, even though the parameters of bargaining topics may be set by law, and cases cumulated to determine specific applications to it, there is no definitive bases upon which employers and employees can agree upon the bargainability of a topic short of third party rulings, whether of a PERB or a court. This situation exists despite various courts having attempted to establish such standards. A decision of the New Jersey Supreme Court provides an example. It held that the following standards would be applied to determine the negotiability of any disputed item: (1) The item must intimately and directly affect the work and welfare of employees; (2) it must not have been pre-empted by statute or regulation, and (3) it must not significantly interfere with the determination of governmental policy-making.[99] A subsequent court's adoption of these standards emphasized that all three must coalesce for an item to be negotiable. Here, the teachers' attempt to arbitrate a grievance alleging racial discrimination was turned aside because "this topic is covered by other statutes and the parties may not agree on any terms which deviate from the standards specified in the other statutes."[100] The same court had earlier refused to rule in a bargainability case, remanding to the PERC a decision on whether the loss of a preparation period and assignment to detention and other supervision duty were proper subjects of bargaining.[101] In Iowa, the PERB ordered a district to negotiate rather than unilaterally adopt an early retirement plan. The district sought judicial review and the PERB's ruling was set aside by the supreme court, which concluded that "the act's wording and legislative history indicated an intent to retain broad employer rights and to carve out specific narrowly defined, exceptions for mandatory negotiation."[102] Applying this narrow definition to the PERB's finding that the early retirement benefit was "pay" and "wages" as included in the law, the court found that "supplemental pay means pay for rendering a service; it does not appear to be intended as a payment for not working. In other words, it is pay based upon extra services and directly related to the time, skill, and nature of the additional services. It is not intended to be tied solely to a person's age, as the cash incentive plan is here."[103] The same Iowa court determined in another case that the number of credit hours to be earned by teachers for salary advancement as well as what to do when such requirements are not met are mandatory subjects of bargaining. However, the nature of the credits that would be acceptable and the bases upon which the superintendent would determine them were only permissive. The state's PERB had ruled all the topics permissive.[104] The problem of definitively determining bargainability without a third party ruling is highlighted by noting that these disputes arose in Iowa, which has the following unusually specific listing of bargainable topics in its legislation:

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[97] Modesto, *supra*, note 77 at 640.

[98] Hillsborough Classroom Teachers' Ass'n v. School Bd. of Hillsborough Cty., PEB ¶ 37,643 (Fla. Dist. Ct. App. 1982).

[99] Local 195, IFPTE, AFL-CIO v. State, 443 A.2d 187, 192 (N.J. 1982).

[100] Teaneck, *supra*, note 74 at 491.

> [T]o negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, and other matters mutually agreed upon.[105]

The Wisconsin Court of Appeals ruled on the bargainability of a number of topics. The district had refused to bargain on all of them, and requested a PERC ruling on their bargainability. The PERC found that all were permissive except one. The teachers' association then challenged in court the finding that the following are permissive, rather than manadatory: (1) Student contact periods; (2) a teacher's right to discuss school practices and policies and to challenge such policies and their effects through grievance procedures; (3) data contained in teacher application forms and utilized in oral interview procedures; (4) a teacher's responsibility to maintain classroom discipline; (5) the staff handbook and its relation to the collective bargaining agreement; (6) the school board's obligation to provide teachers with clerical assistance; and (7) a teacher's right to be free from discipline when speaking or writing as a citizen.[106] The court of appeals affirmed regarding the first six, but reversed as to the last. The decision discussed at length the teachers' contention that changes in the state's bargaining law and the practices of public sector labor relations necessitated that the court abandon its old tests for assessing the validity of agency rulings, *i.e.*, (1) "the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight;" and (2) the agency's determination will not be reversed "where its statutory interpretation is one of several reasonable interpretations that can be made equally consistent with the statutory purpose." The court declined this invitation, reaffirming that the applicable standard for determining whether a subject is mandatory or permissive will continue to be

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[101] The Bd. of Educ. of the Voc. School in Cty. of Camden v. CAM/VOC Teachers' Ass'n, 443 A.2d 756 (N.J. Super. Ct. App. Div. 1982).

[102] Fort Dodge Commun. School Dist. v. Public Employment Rels. Bd., 319 N.W.2d 181, 183 (Iowa 1982).

[103] *Id.* at 184.

[104] Woodbine Commun. School Dist. of Harrison, Monona & Shelby Ctys. v. Public Employment Rels. Bd., 316 N.W.2d 862 (Iowa 1982).

[105] *Id.* at 864.

> a proposal primarily related to wages, hours, and conditions of employment is a mandatory subject of bargaining on which there is a duty to bargain. A proposal that related to educational policy and school management and operation is a permissive subject of bargaining and it imposes no bargaining duty.[107]

The decision also discussed at length the court's rationale for its finding in each of the disputed topic areas.

Initital resolution of such disagreements on bargainability by litigation is discouraged in Wisconsin by the statutes, which provide that

> whenever a dispute arises between a municipal employer and a union of its employees concerning their duty to bargain on a subject, the dispute shall be resolved by the commission on petition for declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effects of an order.[108]

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[106] Blackhawk Teachers' Fed'n Local 2308 v. Wisconsin Employ. Rels. Comm'n, 326 N.W.2d 247, 250 (Wis. Ct. App. 1982).

[107] *Id.* at 252.

[108] WIS. STAT. § 111.70(4)(b) (1982).

The California Court of Appeals ruled in a complex decision that the following are mandatory subjects of bargaining under the state's bargaining law: Reduction of preparation time within the school day without changing the length of the work day; regulation of the activities of union stewards; and assignment of bus drivers to special trips. However, bargaining on proposals regarding the following was found not to be permitted: Discrimination based on political, racial, religious, sex, and other grouping; organizational rights of communication with its membership; orientation to and distribution of the published collective bargaining agreement; bonus for suggestions; limitations on hiring students as employees; creation of new positions; reclassification of old positions; layoff and seniority for nonprobationary employees; employee discipline where it is at variance with the statutes; in-service training; and limitations on outside contracting.[109] It should be noted that California's bargaining law, in the words of the court, is "aimed at narrowing the scope of bargaining" and only admits of two classes of bargaining subjects: (1) mandatory and (2) forbidden (the statute states that "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating").[110] Mandatory negotiation of a topic extends even to those not yet in an agreement ruled a Kansas court. A board had defended unilaterally changing the number of teaching days by pointing out that the length of the school year was not covered in the agreement.[111]

3.5d Proposals Within Permissive Scope of Bargaining

If bargainability is defined as a three-stage, progressively descending quantum of obligation, then all is not lost, or won, simply because certain subjects may be found nonmandatory. They may still be permissive, and with both sides agreeing to do so, may be bargained. Should agreement on these be reached, the permissive distinction disappears, and it becomes an enforceable part of the extant contract, though probably not extending beyond it. The main function, therefore, of the classification is to permit both sides to elect to bargain or to decline to bargain the subject; or, once begun, to cease bargaining it. In three states, the scope of permissive subjects was sharply limited during 1982. Delaware's bargaining statute was similarly interpreted, the court finding that the law's requirement of good faith negotiation on salaries, employee benefits, and physical working conditions, but referring only to "discussion" of other matters, contains "no express provision for 'permissive' subjects of collective bargaining."[112] Reclassification of groups of positions affecting more than 100 job titles was found to be permissive in Maine, not mandatory as the association had sought.[113] Additional rulings on permissive subjects of bargaining are inherent in the decisions reviewed in other sections of this chapter.

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[109] San Mateo City School Dist. v. Public Employment Rels. Bd., 179 Cal. Rptr. 647, 653-658 (Cal. Ct. App. 1982).

[110] *Id.* at 651.

[111] Dodge City Nat'l Educ. Ass'n v. Unified School Dist. No. 443, 635 P.2d 1263 (Kan. Ct. App. 1981).

A recent development in Wisconsin, where the permissive concept is broadly interpreted, is perhaps more interesting than various isolated rulings that this or that topic is or is not permissive. The state's educational employee association, after enjoying several years of rather generous application of the permissive concept by boards, has recently been lobbying extensively for legislation that would transform all agreements on permissive subjects in any agreement into mandatory subjects in subsequent discussions. The proposal was vetoed by the Governor in 1982, but remains a high priority for the teachers' state organization. Currently employers are being advised by their counsel to eliminate any and all permissive subjects from this year's negotiations (which they can do by simply refusing to negotiate regarding them). This will result in the provisions simply dropping out of existence when current contracts expire. The Milwaukee Public Schools sought declaratory ruling from the PERC on over eighty items in its contract, and received notice recently that only four of them are mandatory. The remainder (more than seventy), it can either bargain or not, as it sees fit.[114] Some districts in the state are trying to avoid direct confrontation with associations on permissive items by seeking agreement on "zipper" clauses to the effect that should the legislation be passed, all "permissive" items currently in the contract will automatically and immediately drop out.

3.5e Proposals Within Prohibited Scope of Bargaining

As was the case in the two preceeding sections, applying the concept is not nearly as neat and definitive as articulating it. Perhaps everyone concedes that certain topics are—perhaps even should be—prohibited in public sector bargaining, but dispute arises in their identification. Courts generally consider topics to be forbidden if they (1) compromise the board's legislative responsibility to operate the schools; or

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[112] Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA, 449 A.2d 243, 247 (Del. Super. Ct. 1982).

[113] State of Maine v. Maine State Employees' Ass'n, PEB ¶ 37,542 (Me. Sup. Jud. Ct. 1982).

[114] Wisconsin Employment Relations Commission Dec. No. 20093-A (Feb. 1983).

(2) change a practice already set by legislation or policy. The bargainability of any issue within these two parameters can be established by PERB declaratory rulings where so provided or by one side refusing to discuss a proposal, thus inviting a charge of an unfair labor practice; or by arbitration or litigation of a contract dispute, wherein the provision is found to be outside the scope of bargaining, therefore unenforceable. In Maine, the board refused to bargain the subjective aspects of teacher evaluation, claiming prior coverage by preemptive legislation. The court determined that consultation with teachers in developing "policies and procedures" would not be prohibited, but that decisions to reduce staff and the criteria to be used therein, must be retained as the sole discretion of the board. Specifically, the following were found to be not negotiable: (1) The establishment of a joint committee of teachers and administrators to develop evaluation criteria and evidentiary standards of their satisfactory attainment; (2) submission of decisions to terminate a teacher to the grievance process; (3) informing teachers of all classroom evaluation visits in advance; (4) the qualifications of evaluators; and (5) the format of written evaluations. The court was firm in its conviction that

> while the policy established for evaluating tenured teachers intimately and directly affects the work and welfare of these public employees, it also involves the exercise of inherent management prerogatives. A negotiated agreement on that subject would significantly interfere with the determination of governmental policy. Therefore, regardless of the presence of pre-emptive legislation, there can be no negotiation on the subject of criteria for evaluating the teaching staff.[115]

An example of prohibited bargainability being found in litigation of an arbitrator's award occurred in New York. There, a court ruled that a district could not bargain away its responsibility to assign staff, thus upsetting an arbitrator's award.[116]

Perhaps the best guidance on what may be found to be prohibited subject of bargaining can be found in the various cases which were discussed in sections 3.5c and 3.5d. The generally accepted principle is that any topic that is not included within mandated or permissive bounds or is covered by other legislation (such as tenure, certification, or management rights) is thereby preempted for bargaining purposes. This gives some notion of subjects that may and should be avoided.

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[115] Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 449 A.2d 1254, 1259 (N.J. 1982).

[116] Teaneck, *supra*, note 74.

3.5f Terms of Collective Bargaining Agreements

Although most disputes regarding various terms of agreements are discussed in one or the other of the previous sections, some litigation examines directly the content of the agreement's language. The courts have a clear disposition toward resolving such disputes in a manner that will result in a minimum of judicial intrusion into labor relations. An Indiana court explained it thusly: "The courts prefer a construction that harmonizes contract terms over an interpretation that leaves provisions in conflict."[117] A Michigan court found that the terms of an agrement did not prevent a district from deducting from the benefits due a deceased employee's widow, his accumulated and unused sick and emergency leave. A trial court had ruled for the claimant finding that the retirement provisions of the contract applied because "death was the ultimate retirement." The appellate court reversed, finding neither precedent nor contract language for this interpretation.[118] Also in Michigan it was ruled that the terms of an agreement could include a plan to protect minority teachers from disproportionately carrying the burden of layoff done by seniority alone even though no judicial finding of past discrimination had ever been filed.[119]

Wisconsin's rather expansive tradition regarding permissive subjects of bargaining was found to permit a board to agree to terms which limited its statutory power to nonrenew teachers without cause (the statutes do not require just for nonrenewal in most Wisconsin districts). The court ruled that even though the board had limited itself by agreeing to nonrenew only when just cause existed, it still held the exclusive right to decide whether or not to initiate such an action.[120]

Perhaps the most complex case regarding terms of an agreement occurred in Massachusetts where the state's supreme judicial court ruled simultaneously on three companion cases and numerous related intervenors and amicus curiae. The problem arose when the city council, which had the statutory obligation to provide some of the funds for the operation of the schools, and which operated on a single fiscal year budget cycle, refused to appropriate sufficient money to permit implementation of the second and third years of a three-year agreement the school committee had negotiated with the Boston Teachers' Union. Not only were the salary provisions involved, but also job security clauses were threatened because of the impact of the district's having much less revenue than anticipated. The union sought relief to prevent the layoff of over 2,000 tenured teachers without individual hearings, while both the school committee and the union sought relief to compel the city council to provide sufficient funds to implement the agreement's financial package. The court conluded

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[117] Elkhart Commun. Schools v. Review Bd. of Indiana Employment Security Div., 438 N.E.2d 323, 325 (Ind. Ct. App. 1982).

[118] Carpenter v. School Dist. of City of Flint, 321 N.W.2d 772, 775 (Mich. Ct. App. 1982).

[119] Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).

[120] Fortney v. School Dist. of West Salem, 321 N.W.2d 225 (Wis. 1982).

> that the salary increases provided for in the collective bargaining agreement are enforceable, and that the mayor and the city council should appropriate money to pay them. We also conclude, however, that the job security clause is unenforceable for periods exceeding one year, and further, that hearings pursuant to G.L. c. 71, sec. 42, are not required where dismissals are due to budgetary considerations.[121]

In enforcing the salary increase, the court depended heavily on a statutory permission granted to public employers to agree to contracts up to three years in duration. It concluded that this provision had bound the city council to all three years of such an agreement when it approved and funded the first year of it in 1980. "Presumably the city council knew that there were incremental cost items that would require funding in the second and third years of the agreement. We think that when the city council approved the contract, it in essence agreed to fund those incremental cost items."[122]

The court, however, had no such statutory provision on which to base its ruling regarding the job security clause. It depended, therefore, primarily on common law principles of inherent managerial rights in finding that

> a provision in a collective bargaining agreement that attempts to restrict the ability of a school committee to determine on an annual basis the size of its teaching staff intrudes into an area of exclusive managerial prerogative. General Laws c. 71, sec. 37, provides that the school committee "shall have general charge of all the public schools. . . ." Essential to the management of the public schools is the ability to determine the appropriate size of the teaching staff in light of available funds. We do not believe that the Legislature, in C.L. c. 150E meant to permit school committees to bargain away their managerial powers in this area.[123]

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[121] Boston Teachers' Union Local 66 v. School Comm. of Boston, 434 N.E.2d 1258, 1261 (Mass. 1982).

[122] *Id.* at 1265.

[123] *Id.* at 1267.

An interesting distinction was made by the court between funding salary increases and funding job security agreements. It noted that the unique system of financing the Boston Public Schools

> has the effect of placing the financial burden of maintaining job security in the Boston school system primarily on the school committee. Thus only the incremental costs of collective bargaining agreements, i.e., salary increases . . . should be appropriated by the city council. We conclude, therefore, that the Boston school committee may not compel an appropriation by the city council for the purpose of enforcing a job security clause in a collective bargaining agreement.[124]

Denying the union's claim for individual hearings on the layoffs was based on both statute and case law as follows:

> Logic dictates that dismissals based on budgetary considerations be treated no differently than dismissals made because of declining enrollments. Both factors are very similar in their nature, and they often coexist, as is the case here. . . . Both are established in law as constituting "good cause" for the dismissal of a teacher—the former by case law . . . and the latter by sec. 42. For these reasons, . . . we construe sec. 42 not to require notice and a hearing when a tenured teacher is dismissed solely because of budetary considerations provided, of course, that such reasons are not proffered by the school committee as a sham or subterfuge.[125]

The importance of contract language to board prerogatives, as well as in protecting employees, was illustrated in a New York case which found that in the absence of specific statutory and contract language permitting it, the board could not withhold the salary of a teacher who was absent from his classes to attend hearings regarding his competence and continuation as a tenured teacher. The court ruled that the failure of the statutes or the terms of the agreement specifically to authorize such action foreclosed the boards' capability to do so inasmuch as, "compensation has been held to be a matter of such substantive right on the part of a teacher that it cannot be withheld without explicit statutory authorization."[126] Teachers in the same state were bound by the terms of their agreement regarding the inapplicability of their substitute service to their seniority, despite a statutory provision to the contrary. The court determined that a collective bargaining agreement may waive certain rights affirmed under the statutes.[127] Terms of an agreement in Vermont which stated that evaluations would "aid" in reappointment decisions were not interpreted to require that reappointment decisions be based on them, in whole or in part. The teacher had less than three years of experience, which influenced the court inasmuch as the agreement distinguished between teachers with less than three years and those with more in its reappointment procedures.[128] Terms which required a district to restore teachers returning from sabbatical leave to the same room of the same school from whence they had departed, were not construed to extend to teachers an administrative or any other nonteaching classes of service.[129] An administrator in Colorado who was reassigned to a teaching position attempted to invoke the requirement of the administrators' agreement that transfer would not occur without reasons being presented. The court found that "transfer" referred only to changes among administrative positions, not changes between them and teaching. Once he was reassigned, ruled the court, any protections due from the administrators' collective bargaining agreement no longer applied to him.[130] In Massachusetts, where the terms of the agreement expressedly denied nonmembers access to the grievance procedures, and where it was unclear whether the employer would have represented the affected employees adequately, such terms were held sufficient to justify a stay of arbitration.[131]

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[124] *Id.* at 1268.

[125] *Id.* at 1269.

[126] Faville v. Board of Educ., 455 N.Y.S.2d 81, 82 (N.Y. App. Div. 1982).

Teachers in North Dakota found that the terms of their agreement did not include items that they had placed on the table during bargaining but had been unsuccessful in getting into the completed agreement. The board was found justified in unilaterally deciding to adhere to past practice and maintain its payroll on a twelve-month schedule.[132] In Rhode Island, the terms of an agreement were interpreted as permitting an arbitration panel to order a board to compile and present to the union a list of teachers who would be affected by a potential grievance ruling. The issue was found not to be a matter of arbitrator's exercise of power; merely the interpretation of the terms of the agreement.[133]

A court in Oregon made an interesting comment regarding terms of collective bargaining agreements in response to a teacher association's assertion that implementation of school board policies should be subject to the grievance procedure the ERB had ruled that:

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[127] Wiener v. Board of Educ. of East Ramapo Cent. School Dist., 455 N.Y.S.2d 828 (N.Y. App. Div. 1982).

[128] Swett v. Vermont State Colleges, 448 A.2d 150 (Vt. 1982).

[129] Thrash v. Board of Educ., School Dist. No. 189, 435 N.E.2d 866 (Ill. 1982).

[130] Marsh v. St. Vrain Valley School Dist., 644 P.2d 41 (Colo. Ct. App. 1982).

[131] Greenfield, *supra*, note 18.

[132] Giacalone, *supra*, note 95.

[133] Providence Teachers' Union v. Providence School Comm., 440 A.2d 124 (R.I. 1982).

> We shudder to contemplate an arbitrator's pronouncement when asked to determine whether the violation of this policy resulted in an "unfair event." We entertained similar misgivings, in our original order, over submitting to the arbitrator the proper interpretation of the District's policy on student discipline, including the policy that discipline will be applied "fairly and consistently". . . . Indeed this parade of horribles can be extended on and on by opening the District's 150 page School Board Policy Statement almost at random. And this is no accident. Unlike the language of bargained contracts, written school board policy statements often contain a great deal of pious hope and very little of specific directive. We believe that such policy generalizations serve a distinct leadership function proper to a school board; but that function is sometimes incompatible with the function which *contract* language must fulfill, including the scrutiny of an arbitrator.[134]

3.6 GRIEVANCES

Grievances play a dual role in public sector bargaining. They are not simply means to secure third-party determinations regarding disagreements on the interpretation of contract terms. Recently though that role has not been lost, another has developed. Grievances now function, additionally, as virtually necessary steps preliminary to obtaining judicial review of labor relations disputes. Consequently any contemplation of grievance filing or disposition must take into consideration the possibility that the motives of the parties may supersede the facts of the case at hand. It may be that either the filing of a grievance or one's denial may have less to do with the merits of the dispute than with a desire to have the germane statute or contract provision adjucated after arbitration and reviw by a PERB.

3.6a Grievability and Arbitrability

Arbitration typically cannot be reached without going through the initial step of filing a grievance, thus setting the stage for the disagreement on the application of the provisions of the collective bargaining agreement. Further, court decisions regarding the arbitrability of matters are always based on the validity of the claim that they are subject to or controlled by such provisions. Consequently, for all practical purposes, grievability and arbitrability will be treated in this section not as two questions, but one.

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[134] Eugene Educ. Ass'n v. Eugene School Dist. 4J, 648 P.2d 56, 60 (Or. Ct. App. 1982).

3.6a(1) Presumption of Arbitrability

It is easy to formulate two answers to the question of the grievability and arbitrability of issues. One, from the employer's point of view would be "as little as possible." The other, from the employees' perspective, would be, "as much as possible." Diehard traditionalists on either side might simply assert, "nothing" or "everything" depending on their current status and vested interests. Such extremism, however, is not helpful, for not unlike the issue of bargainability, no definitive answer to the question of grievability and arbitrability can be formulated; only operational, ever-developing guidelines exist somewhere between the bipolar doctrinaire extremes.

Courts generally refrain from taking either side. They are willing to decide issues on a case by case basis, but only after all administrative remedies, including grievance filing and arbitration are exhausted. This position was well-expressed by the Wisconsin Supreme Court as follows (quoting from an earlier decision):

> The law of Wisconsin favors agreements to resolve municipal labor disputes by final and binding arbitration. An arbitrator's award is presumptively valid, and it will be disturbed only where invalidity is shown by clear and convincing evidence . . . the parties bargain for the judgment of the arbitrator —correct or incorrect—whether that judgment is one of fact or law.[135]

In Pennsylvania, a court was no less strident in its opposition to bypassing administrative remedies. "We condemn that practice and hold that hereafter issues involving conflicts between a public school collective bargaining agreement and fundamental statutory policies . . . must be presented first to an arbitrator for determination, subject to appropriate court review of any award in conflict with such policies."[136]

Arbitrability, it follows, will be given a wide scope of permissibility. Hence, the question is most often examined by the broad "essence" test, which requires only that the matter be reasonable related to contract provisions rather than wholly and specifically contemplated by expressed language. A Washington court defined it as follows: "There is a strong presumption in favor of arbitrability; all questions on which parties disagree are presumed to be within the arbitration provisions unless negated expressedly or by clear implication."[137]

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[135] Fortney, *supra*, note 120 at 229.

[136] Pennsylvania Labor Rels. Bd. v. Bald Eagle Area School Dist., 451 A.2d 671, 674 (Pa. 1982).

[137] The Council of Cty. and City Employees, AFSCME v. Spokane Cty., 647 P.2d 1058, 1060 (Wash. 1982).

The commonly used grant of authority to bargain on, among other things, "terms and conditions of employment," constitutes a broad net of arbitrability: only rarely does a claim of nonarbitrability prevail. A New York district attempted to establish the nonarbitrability of its denial of requests for leave by arguing that the vagueness of the agreement's definition of grievance rendered the matter nonjusticable. This did not persuade the court, which found that the clause defining a grievance as a claim "that there has been a violation, misinterpretation, or inequitable application of a provision(s) of this Agreement" was unambiguous and clearly authorized arbitration of the dispute.[138] Also in New York, a claim that the board improperly considered parent complaints in a decision to deny tenure was found arbitrable. The board had not discussed the communications with the teacher, as required by the contract. Hence, found the court, the matter was contractual rather than solely a managerial prerogative to nonrenew a probationary teacher.[139] Withholding and deferral of salary payments were found to be arbitrable since they were mentioned in the collective bargaining agreement in another New York district.[140]

In Kansas, arbitrability of provisions in an agreement was found valid under the state's professional negotiations act rather than the uniform arbitration act (UAA). A district had refused to implement an arbitrator's award claiming that it exceeded his authority and jurisdiction granted by law. The teachers' association tried unsuccessfully to convince the court that the trial court's decision in its favor had been properly based on the UAA. The court disagreed, remanding the dispute back to the trial court.[141] In Illinois, when a district argued inarbitrability of a matter because the contract lacked "mutuality" arising from the fact that the teachers had at one time claimed they were "under duress" to reach agreement, a court disagreed. It found that the teachers' discomfort with a contract is not dispositive of its arbitrability—only its acceptance is germane. Consequently, the district was not permitted to exempt from arbitration disputes over sick leave and the length of the school day that arose when board action brought the number of days under the state's statutory minimum. The court emphasized that, "the class of inarbitrable issues should be limited to those areas specifically reserved to school boards by the School Code."[142]

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[138] Lansingburgh Teachers' Ass'n v. Hardwick, 446 N.Y.S.2d 471 (N.Y. App. Div. 1982).

[139] *In re* Board of Educ. of Armonk Cent. School Dist., 454 N.Y.S.2d 85 (N.Y. App. Div. 1982).

[140] DeCiutiis v. East Meadow Union Free School Dist. No. 3, 449 N.Y.S.2d 259 (N.Y. App. Div. 1982).

[141] National Educ. Ass'n, Topeka v. Unified School Dist. No. 501, 644 P.2d 1006 (Kan. Ct. App. 1982).

Clearly, the burden of proof is on anyone claiming that non-arbitrability renders an award void. The basis upon which a court will determine such claims can best be summarized by the principle that any limits placed on negotiability also constrain arbitrability. This occurs because the two conditions are a unity--either being the mirror image of the other. Two decisions in New Jersey illustrate: One court ruled in the positive case that "if the subjects of the grievance are within the scope of collective negotiations they are clearly within the scope of arbitration;"[143] the other ruled in the negative that "if a subject is non-negotiable, it is also non-arbitrable."[144]

Some disputes, consequently, go through the entire grievance and arbitration process only to be reversed by courts which find that the matter was not bargainable in the first place, either due to lack of statutory authority or by preemption by other statutes. Thus, an arbitrator in New York was found without the power to order a school board to reassign a grievant to a particular position because such authority is a nondelegable grant to the board.[145] Similarly, in Indiana an arbitrator acted beyond his scope of authority when he determined that the disputed transfer of an employee was conducive to the "general welfare" of the district, the standard provided in the contract. Only the school board, ruled the court, has the power to determine the general welfare through exercising its duties in hiring, promotion, and assigning employees; contract provisions to the contrary were found void.[146]

Limitations can be placed on arbitrability by language in the collective bargaining agreement expressedly limiting grievances to alleged violations of the terms of the agreement. Specifically exempting certain provisions can also limit the range of issues an arbitrator can hear. Kansas law was interpreted by a court as permitting an employer to reserve the term "binding" from applications for arbitration, thus limiting the effect of awards.[147]

3.6a(2) Who Determines?

No court has discovered a definitive a priori answer to who is to determine disputes in contract administration which can cover every conceivable issue. Sometimes the school board is found to be the panel of last resort; other times it's an arbitrator. Often a PERB panel or other administrative hearing body is dispositive. And, in many cases, there is a prospect of formal litigation. The court's comment in a New Jersey case cited earlier illustrates:

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[142] Board of Educ., Arbor Park School Dist. No. 145, Cook Cty. v. Ballweber, IEA-NEA, 434 N.E.2d 448, 451 (Ill. Ct. App. 1982).

[143] Camden, *supra*, note 101 at 761.

[144] Teaneck, *supra*, note 74 at 492.

[145] Sweet Home, *supra*, note 83.

[146] Tippecanoe Educ. Ass'n v. Board of School Trustees of Tippecanoe School, 429 N.E.2d 967 (Ind. Ct. App. 1982).

[147] Dodge City, *supra*, note 111.

> Simply because we have determined that the subject of racial discrimination is nonarbitrable, that does not mean Mr. Subiaurre cannot pursue his grievance before another tribunal. Even though we hold that his grievance is not subject to binding arbitration he is nonetheless free to pursue his grievance before PERC . . . as an unfair labor practice. He can also pursue the grievance before the Division on Civil Rights or the Law Division. . . . We further recognize that the Commissioner of Education, Division of Controversies and Disputes, also has jurisdiction to hear the grievance.[148]

Generally, however, courts are consistent in insisting that conflicts between collective bargaining agreements and the statutes are, as expressed by an Illinois court "for the arbitrators, not the courts, to decide . . . such decisions usually require construing the agreement in light of the customs and practices of the industry, a task peculiarly within the competence of the arbitrator."[149] Not just any old arbitrator will do, however, as was discovered in Connecticut where a court ruled that a city director of labor had no authority to bind a school district in a grievance award. The reinstatement of a discharged employee by the director (acting as an arbitrator) and its subsequent upholding by the labor relations board was therefore reversed.[150]

Though every issue is not guaranteed a day in court, courts of last resort are willing to accept jurisdiction where circumstances warrant it. The Wisconsin Supreme Court discussed the matter at some length in a case arising from a district's discharge of a teacher after conducting a hearing and receiving the recommendation of a fact-finder. The teacher grieved the action and was reinstated by an arbitration panel. A trial court vacated the arbitration decision, and an appellate court reversed. The supreme court affirmed the reversal, reducing the issue to a determination of the legality of the arbitration panel's having conducted a de novo factual hearing to establish, for itself, whether just cause existed for the dismissal. The district claimed that the panel should have limited itself to a review of the record to assess the fairness of the proceedings. The supreme court disagreed wholly, stating that

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[148] Teaneck, *supra*, note 74 at 492.

[149] Board of Educ. of Posen-Robbins School Dist. No. 143½ v. Daniels, 439 N.E.2d 27, 31 (Ill. 1982).

[150] New Haven Bd. of Educ. v. Connecticut State Bd. of Labor Rels., No. 19-41-06, PEB ¶ 37,544 (Conn. Super. Ct. 1982).

> the dispute is over who determines whether just cause exists. . . . We conclude that harmonizing the collective bargaining agreement provisions with the board's power to discharge set forth in section 118.22(2), Stats., leaves the board with the exclusive right to discharge an employee but requires that just cause exist for the discharge. If the employee contends there was no just cause for discharge, he may process a grievance through the grievance procedure contained in the agreement. If that grievance goes to arbitration, the arbitrators under the terms of the agreement, may make an independent determination of whether there was just cause for the discharge, relying on whatever procedures they deem necessary to reach that determination.[151]

Two strong dissents, however, were filed, both of which objected to the decision's broad grant of power to arbitrators in the state to conduct de novo hearings and, thus, encroach on the statutory power of boards of education.

A Pennsylvania court upheld an arbitrator's reversal of a superintendent's decision that a teacher's advanced study was not sufficiently beneficial to the district for it to qualify for tuition reimbursement under the terms of the agreement. The arbitrator heard testimony regarding the content of the courses and independently determined them to be beneficial to the district. The court felt the action to have been rationally derived from the terms of the agreement and refused to concede that it had usurped the board's authority in any way.[152] Another court in the same state ruled similarly, finding that under the terms of the agreement disputes on the standards to be used in determining a teacher's entitlement to a salary increase based on graduate credits was arbitrable. The courts, according to the rationale "must initially determine if the terms of the collective bargaining agreement encompass the subject-matter of the dispute; . . . the court's inquiry ends once it is determined that the issue properly defined is within the terms of the agreement."[153] In New York, presumption of arbitrability was reinforced by a court ruling that the PERB was empowered to determine that a residency requirement was a qualification for employment rather than a term and condition of employment. As such, it was beyond the scope of negotiation and arbitration.[154]

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[151] Fortney, *supra*, note 120 at 232-233.

[152] Rose Tree Media School Dist. v. Rose Tree Media Educ. Ass'n, 442 A.2d 23 (Pa. Commw. Ct. 1982).

[153] West Chester Area School Dist. v. West Chester Educ. Ass'n, 449 A.2d 824, 825 (Pa. Commw. Ct. 1982).

[154] Rensselaer City School Dist. Unit of Rensellaer Cty. Educational Local of Civil Service Employees' Ass'n v. Newman, 448 N.Y.S.2d 883 (N.Y. App. Div. 1982).

3.6a(3) Remedy as a Factor in Arbitrability

Courts, on occasion, set aside awards—taking unto themselves the prerogative to restore faulty determinations. They do not do so lightly, however, for they recognize the broad authority that is vested in an administrative body or procedure, whether it arises from statutory provisions, individual contracts, bargained agreements, or the courts' own long-standing desire not to hear labor related cases. In Florida, nevertheless, a teacher won back pay after a court decided that a state agency's admission of error in revoking his certificate carried with it the obligation to make retroactive salary restoration.[155] In Washington, an arbitrator's consideration of a grievance was found valid even though the district had, in the meantime, made a nonappealable decision to nonrenew the teacher's contract. The latter action only functioned, according to both the arbitrator and the court, to prevent the arbitrator from reinstating her to full contract status. Other redress appropriate to the violations was permitted.[156]

3.6a(4) Procedural Issues

Correct procedure is at the heart of all dispute resolution in public sector bargaining, whether the issue is initiated by employer or employee. Generally, the fundamental procedural requirement is that all administrative remedies, starting with filing a grievance and going through arbitration and PERB review are required prior to filing a complaint in court.[157] A teacher's recovery in a Vermont trial court of a claim of unjust dismissal was set aside on appeal because the teacher had cited the collective bargaining agreement in his complaint but had never gone through the administrative procedures listed therein.[158] Citing the exact provisions allegedly violated is the foundation of all procedures leading to arbitration, although courts often adopt a generous definition of what constitutes such citation. Listing sections by number and "tracking the language of such sections" in the descriptions of the alleged violation is much to be preferred.[159] One association in New York was required to be specific in citing references regarding claimed violations before arbitration could be invoked.[160] This, despite another court's finding that an interpretation of a collective bargaining agreement in New York could be arbitrated without an actual citation of a violation. The agreement, according to the court, "specifically permits the union to invoke the grievance procedure when it believes that there has been misinterpretation of any of the provisions of the agreement."[161] In Rhode Island, specificity of citation was not extended to include requiring the board and the teachers' to agree totally on the issue presented in their dispute. Their disagreement was not allowed to thwart the "submission" requirements of the binding arbitration statute.[162]

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[155] Brooks v. School Bd. of Brevard Cty., 419 So. 2d 659 (Fla. Dist. Ct. App. 1982).

[156] North Beach Educ. Ass'n v. North Beach School Dist. No. 64, 639 P.2d 821 (Wash. Ct. App. 1982).

[157] Spokane County, *supra*, note 137; Zell v. Board of Educ. of City School Dist. of New York, 450 N.Y.S.2d 875 (N.Y. App. Div. 1982).

[158] Morton v. Essex Town School Dist., 443 A.2d 447 (Vt. 1982).

[159] Board of Educ. of Cattaraugus Cent. School v. Cattaraugus Teachers' Ass'n, 447 N.Y.S.2d 51 (N.Y. App. Div. 1982).

[160] Dansville Cent. School Dist. v. Dansville Teachers' Ass'n, 448 N.Y.S.2d 303 (N.Y. App. Div. 1982).

Procedural necessity was found sufficiently important by a Vermont court that it refused to substitute oral discussion of a grievance for contractually required written filing.[163] Procedures can be broken, as well, by failing to treat them as significant. A teacher who failed to attend her own hearing, failed to notify district of her projected absence, and failed to request continuation of the proceedings, was found to have failed, as well, to establish any intent to pursue her interests in receiving back pay that was allegedly due.[164] An extensive discussion of procedural issues occurred in a California case. An instructor in the Defense Language Institute was unsuccessful in obtaining a United States district court hearing for his damage suit against the United States for breach of contract because his claim exceeded the $10,000 limitation set by law for district court jurisdiction.[165] A teacher in Illinois was foreclosed from appealing to a court an adverse arbitration decision regarding her claim to extra duty pay. She had not appealed first to the PERB.[166] A teacher in Florida was not permitted to reformulate an appeal for reinstatement based on the removal of only two letters from her personnel file. Her reinstatement by an arbitrator had been vacated because he had exceeded his authority in removing six documents from her file. The nonspecificity of her original grievance regarding the six letters in question was found to have constituted a waiver of specific claims based on only two of them.[167] Public employees who were not members of the bargaining unit were, on the other hand, not required to activate arbitration by submitting to internal union remedies prior to seeking court review. The issue, however, was recovery of dues check-off amounts under a fair-share agreement, which consistently is recognized as presenting a property interest claim.[168]

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[161] *In re* Board of Educ. of Greenburgh Cent. School Dist. No. 7, 445 N.Y.S.2d 468, 469 (N.Y. App. Div. 1981).

[162] Providence, *supra*, note 133.

[163] D'Aleo v. Vermont State Colleges, 450 A.2d 1127 (Vt. 1982).

[164] *In re* Barrington Educ. Ass'n, 437 A.2d 718 (N.H. Super. Ct. 1981).

[165] Karahalios v. Defense Language Inst., Foreign Language Center, Presidio of Monterey, 544 F. Supp. 77 (N.D. Cal. 1982).

[166] Board of Educ. of Berwyn School Dist. No. 100, Cook Cty. v. Metskas, 436 N.E.2d 587 (Ill. 1982).

[167] Watson v. Duvall Cty. School Bd., 408 So. 2d 1053 (Fla. Dist. Ct. App. 1982).

Probably the most-cited procedural defect is lack of timeliness in filing, inasmuch as grievance procedures typically place limits on the length of time an employee can delay filing a claim that the collective bargaining agreement was violated. Lack of timely filing resulted in the dismissal of a New York teacher's civil action complaint that her seniority status had been violated by the district's not having placed her on the regular substitute list. She had filed the action because her union had declined to pursue her grievance all the way to arbitration. The court dismissed because

> the collective bargaining agreement discloses that the plaintiff was empowered to proceed to the higher stages of the grievance procedure on her own, despite the union's refusal to continue. Plaintiff failed to utilize that relief . . . her claim for judicial relief, therefore, must be dismissed on the basis that her sole remedy lay under the collective bargaining agreement.[169]

(All of this added up, in a roundabout manner, to lack of timely filing.) Teachers in Mississippi were found to have foreclosed any claim they might have had to supplement their salaries under district policies by neglecting to apply timely. The district refused to modify their status retroactively. The court upheld, finding that the teachers had once had their opportunity and knowingly let it pass.[170] The same constraint was placed on a board in Maine which had failed to object to the delay in obtaining an arbitrator's ruling during the four years it took him to fashion one. The court ruled that a party "which fails to state its objection to the lateness of an arbitration award in writing prior to the delivery of the award has waived objection."[171] In New York, a collective bargaining agreement's requirement for filing grievances within ninety days of the alleged violation's occurence came into conflict with the statutory provision requiring three months. The court found that the collective bargaining agreement's provision waived and made inapplicable the statutory requirement inasmuch as the parties had affirmatively intended to change the statutory requirement.[172]

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[168] Franklin, *supra*, note 17.

[169] Pizzardi v. Smithtown School Dist. No. 1, 455 N.Y.S.2d 110, 112 (N.Y. App. Div. 1982).

[170] Weatherford v. Martin, 418 So. 2d 777 (Miss. 1982).

[171] Monmouth School Comm. v. Huston, 437 A.2d 621, 623 (Me. 1981).

[172] South Colonie Cent. School Dist. v. South Colonie Teachers' Ass'n, 447 N.Y.S.2d 37 (N.Y. App. Div. 1982).

Timeliness, however, must be clearly required by the collective bargaining agreement or the statutes, as a district in New York discovered. Its request for a stay of arbitration regarding a teacher's complaint about the manner in which he was evaluated during board investigation of charges of incompetence and misconduct because of untimely filing was denied, the court finding that "the agreement lacks any express provision making compliance with the time limitations a condition of precedent; the matter is of procedural arbitrability for the arbitrator.[173] Timeliness will not typically be allowed to thwart the proper disposition of otherwise meritorious claims, particularly when it is broached through no fault of the grievant. In New Jersey, a grievant was allowed thirty additional days to inform the PERC of the tribunal he preferred to hear his claim, which had been found to be nonarbitrable. Without such an extension, the timeliness requirement of all available tribunals would have obviated his ever being heard.[174] In Maine, apparent lack of timeliness was not invoked by a court as constituting sufficient basis to bar a grievance from arbitration. The dispute was over who should file for arbitration (the contract was unclear on the matter) and the meaning intended by the word "immediately" as a timeliness parameter. The court concluded that the district could not avoid arbitration for the failure of the employees to notify immediately of their claim because it was unclear that the duty was exclusively the teachers. Further, concluded the court "the contract's call for immediate notification of the A.A.A. can well be read to be merly hortatory, operating to urge both parties to cooperate in speedy disposition of the existing dispute through arbitration."[175]

Though procedural defects can operate to waive any rights to pursue a matter, teachers in New Hampshire were permitted to file complaints with the PERB two months after the alleged violations. They convinced the court that their signing of contracts agreeing to certain unilateral changes by the district was in response to threats of job loss, hence did not reflect any abandonment of their claims.[176] On the other hand, a teacher who failed to appear for a hearing on charges of misconduct or to have anyone appear on his behalf was deemed to have knowingly and voluntarily waived his right to a due process hearing. Five days notice was considered sufficient since the teacher did not even request a continuance. The fact that he had physically harmed several students (he wounded them with a shotgun) had much to do with the court's finding.[177] A federal court in New York ruled similarly, finding that a former teacher who elected not to participate in his association's administrative proceedings in his defense was without standing to carry forward on his own in federal court.[178] A teacher in New York was permitted simultaneous pursuit of remedies both under the statutes and the collective bargaining agreement, even though the potential existed for contrary conclusions between them.[179] However, another in that state was held to resolution of his dispute by the procedures he chose. He was not permitted to seek arbitration after adverse rulings in the administrative forum he selected under state law. He was bound, ruled the court, to review only by the two statutory remedies available—appeal to the state commissioner or the courts.[180] Seeking arbitration was found by a New York court to constitute agreement to consider the award binding. Both parties had agreed to seek the advice on whether certain sick leave benefits were due substitute teachers. When the arbitrator determined that the disputed employees were not covered by the agreement, the board denied the grievance. The court found that the submission and prior agreement to comply with the advice "effectively altered the proceeding from one of an advisory to one of binding arbitration."[181]

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[173] Cattaraugus, *supra*, note 159 at 53.

[174] Teaneck, *supra*, note 74 at 492.

[175] Saco Valley Teachers' Ass'n v. Board of Dirs., Maine Valley School Admin. Dist. No. 6, 447 A.2d 72, 74 (Me. 1982).

[176] *In re* Watson, 448 A.2d 417 (N.H. 1982).

3.6a(5) Mangement Prerogatives as a Bar

Virtually all litigation regarding grievance and arbitrability is rooted in a board's exercise of perceived discretionary prerogatives or in the desire to do so. The disputes arise when either the statutes or the terms of an agreement are perceived by teachers as preventing such unilateral action. Since such matters are subject to much grey-area interpretation between the well-recognized governmental duties of boards, on the one hand, and the statutory and contractual obligations they have toward employees, on the other, little prior assurance regarding the scope of such prerogatives is possible. In general, however, it is safe to conclude that assertions of managerial prerogatives foreclosing implementation of terms of collectively bargained agreements will not receive a sympathetic hearing. Inasmuch as such agreements are the result of labor-relations statutes pursuant to legitimate state interest, courts have not conceded to local units of government any constitutional or common law defense against abiding by them. Instead courts have adopted a "harmonizing" rolemaking stance, and sometimes make creative efforts to balance the competing claims rather than defer to one side or the other. The treatment of board prerogatives in hiring and firing and contractual protections for individual employees best illustrates this effort. In New Jersey, a court found that

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[177] Crane v. Mitchell Cty. Unified School Dist. No. 273, 652 P.2d 205 (Kan. 1982).

[178] Giacalone, *supra*, note 96.

[179] Cattaraugus, *supra*, note 159.

[180] Poole v. Little Valley Cent. School Dist., 452 N.Y.S.2d 829 (N.Y. Sup. Ct. 1982).

[181] Plainedge Fed'n of Teachers v. Plainedge Union Free Dist., 448 N.Y.S.2d 226 (N.Y. App. Div. 1982).

> we need not discuss the preemptive effect of those provisions that address the substantive aspects of teacher evaluation. Such matters, which involve sensitive educational policy decisions, could not be the subject of mandatory negotiations even in the absence of preempting legislation.... However, on those procedural aspects not covered by the rules or addressed only to the extent of establishing a maximum or a minimum time limit, mandatory negotiation is permitted.[182]

Similarly, in Wisconsin, the supreme court has distinguished between a board's nondelegable duty to hire and fire, and the procedures used leading up to those decisions. The state's municipal labor relations statute was found to be sufficient justification for permitting an arbitrator to conduct de novo hearings on the sufficiency of the evidence used by the board in arriving at a decision to discharge a teacher.[183]

Endless opportunities for disagreement occur when deciding whether a particular board's actions falls within the bargainability zone that is bounded on all sides by the distinction between making managerial decisions and discussing their impact. One thing was certain, however, to a Rhode Island court; boards to not have the prerogative to withdraw unilaterally from bargained agreements simply because, at some later date, they feel them to be erosive of their governmental powers.[184] Even an expressed provision in an agreement prohibiting an arbitrator from interfering with the discretionary power of the board was not sufficient to prevent an expansive award from being upheld in Illinois. There the administration of the Cook County Community College was prevented from assigning librarians to advising duty during registration despite contract language allowing the assignment of all faculty to such duty. The arbitrator ruled that the phrase, "professionally related duties" should be interpreted restrictively and applied only to classroom teachers rather than to all educational staff members. In upholding the arbitrator, the court noted that the board had voluntarily relinquished some of its prerogatives in the bargaining agreement and could not expect to regain them by challenging the arbitrator's interpretations.[185]

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[182] Bethlehem, *supra*, note 115 at 1259.

[183] Fortney, *supra*, note 120.

[184] Chariho Reg. School Comm. v. Chariho Teachers' Ass'n, 447 A.2d 1140 (R.I. 1982).

[185] Board of Trustees of Commun. College Dist. No. 508, Cook Cty. v. Cook Cty. College Teachers' Union Local 1600, 430 N.E.2d 249 (Ill. 1982).

A board's prerogatives can be sharply reduced by its own actions in choosing the manner that issues will be adjudicated. In New York, a board which submitted a matter to an education law hearing panel, "stripped" itself of any additional discretion to submit it, as well, to grievance and arbitration procedures.[186] Prerogatives were limited by a court in Kansas which ruled that if a topic is a mandatory subject of bargaining, the board cannot unilaterally alter its practice therein, even though the matter is not covered in the collective bargaining agreement.[187]

Board prerogatives that seem well-established by statute were not protected in Pennsylvania. Though the school code clearly empowered boards to make necessary regulations regarding leave, a court did not agree that the provision "indicates that the school district retained the right to promulgate regulations at any time during contract term. . . . The power to make regulations pertaining to leave policy is not tantamount to a statutory declaration that the area is removed from bargaining."[188]

In Indiana, a board unsuccessfully tried to validate its action in delaying the opening of school in order to recover salary overages paid in prior years by claiming board prerogative to establish the manner in which fiscal errors will be corrected. The court found the collective bargaining agreement terms unambiguous in not permitting the board to adjust the work year unilaterally.[189] In Illinois, on the other hand, the statutory power of the school board to shorten the school year, so long as the outcome met minimum statutory requirements, was found to supersede collective bargaining agreements regarding annual salaries based on a thirty-nine week year (longer than the state minimum). The court ruled that salaries were subject to the board's right to lay-off employees due to lack of work or lack of funds.[190]

Board power to assign teachers to extra duty was upheld in Iowa, though the decision is far from a milestone victory for management prerogatives. An arbitrator's decision was overturned, not because of its erroneous outcome, but because of its being based on matters outside the scope of the original grievance. As a matter of fact, the appellate court disagreed with both the arbitrator's ruling that such assignments might be made without violating the master agreement, and the trial court's finding that the arbitrator's decision "improperly abrogated rights reserved to the employer."[191] In Washington, an arbitrator found contract provisions relating to nonrenewal procedures for nontenured teacher unenforceable, but a court disagreed, concluding

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[186] Poole, *supra*, note 180 at 831.

[187] Dodge City, *supra*, note 111.

[188] Erie, *supra*, note 87 at 689.

[189] Monroe Cty. Commun. School Corp. v. Frohlinger, 431 N.E.2d 93 (Ind. Ct. App. 1982).

[190] Board of Educ. of City of Chicago v. Chicago Teachers' Union Local 1, 430 N.E.2d 1111 (Ill. 1982).

> that a grievance that falls short of direct conflict with the nonrenewal statute may be heard . . . we . . . decline to limit the remedies available to the arbitrator, but note that his limits are only those of his creativity subject to the bounds of . . . [any order] that impinges upon an exclusive power in the school board over employment matters and the negotiated contract[192]

Board prerogatives were also upheld in a Minnesota decision when a court declined to order a district to bargain its decision to reduce its administrative staff due to declining enrollment. The assignment of seven staff members to new positions at reduced pay was ruled to be a legitimate exercise of board powers. A strong dissent, however, was filed.[193] In Washington state, a statute granting boards the prerogative to nonrenew provisional teachers without cause was found not to create a suspect alss. Sufficient state interest was found in the classification to deny the teacher relief.[194]

3.6a(6) Tenure Issues

Litigation regarding proper bases for teacher dismissal and other tenure-related matters is extensively reviewed elsewhere in this *Yearbook*. That disputes regarding tenure arise in the context of bargaining and contract implementation should occasion no surprise, for job security interests loom large in teacher organizations' lexicon of vital interests. Further, tenure, layoff, and recall procedures are often provided in statutes antedating collective bargaining, which often leads to incongruencies between them and contract terms. All of them, whether statutory or contractual, limit in one way or another boards' common law discretion to hire and fire employees, and, other than over the substantive sufficiency of just cause in dismissal cases, most tenure-related litigation arises from one or another of three fundamental questions: (1) Is granting tenure exclusively the board's domain? (2) Can tenure-like property interest be created outside of specific statutory permission to do so? and (3) Can a teacher who engages vigorously in union activity ever be discharged or nonrenewed?

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[191] Dubuque Commun. School Dist. v. Dubuque Educ. Ass'n, 315 N.W.2d 847, 851 (Iowa Ct. App. 1981).

[192] North Beach, *supra*, note 156 at 824, 825.

[193] Minneapolis Ass'n of Admin. and Consultants v. Minneapolis Sp. School Dist. No. 1, 311 N.W.2d 474 (Minn. 1981).

[194] Hopp v. Oroville School Dist. No. 410, 639 P.2d 872 (Wash. Ct. App. 1982).

A Massachusetts court answered the first, finding that the labor relations commission (and, presumably, an arbitrator) could reinstate a nonrenewed teacher to his position even though the restoration would result in his attaining tenure under the state's tenure law. The court, agreeing with the commission, found that the school committee's motivation for the nonrenewal was retaliation and retribution for union activity. This decision, however, was not arrived at lightly, for the court considered the burden of proof in such allegations to be on the complaining employee, even though a prima facie showing was found sufficient to shift the burden to the employer. Direct evidence, such as antiunion statements, was not required, the court finding that the plaintiffs had a generally good work record; had engaged in protected activity; and that the activity was plainly visible to employer.[195]

Several courts have answered the second question in the affirmative, finding that enabling legislation for collective bargaining implies the capability to make any agreements that will promote good labor relations (*see*, *supra*, section 3.a(5)). A court in New York ruled on the matter directly, finding that "while it is true that a probationary employee does not ordinarily have a property interest entitling him to a termination hearing under the Fourteenth Amendment . . . a collective bargaining agreement may give him a contract right to such a hearing."[196] The grievance procedure was found to invest nontenured teachers with similar tenure-like rights by a court in Pennsylvania.[197]

The third question—can a board remove teachers who are vigorous in union activites?—has been given a qualified "yes." It can be done, but the two actions must not be related. The principle was articulated by the Massachusetts court which provided the answer for question one (quoting an earlier decision):

> [Labor Relations Commission] could find a discharge unlawful under [statute] only if it found that the employee would not have been discharged but for his protected activity. If, however, lawful cause would have led the employer to the same conclusion even in the absence of protected conduct, the discharge must not be disturbed.[198]

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[195] Southern Worcester Cty. Reg. Voc. School Dist. v. Labor Rels. Comm'n, 436 N.E.2d 380, 384 (Mass. 1982).

[196] Gibbons v. Board of Educ. of N.Y.C., 540 F. Supp. 1124, 1127 (E.D.N.Y. 1982).

[197] Greater Johnstown Area Voc.-Tech. School v. Greater Johnstown Area Voc.-Tech. Educ. Ass'n, 450 A.2d 787 (Pa. Commw. Ct. 1982).

[198] Southern Worcester, *supra*, note 195 at 383.

A Washington court was a bit more expansive, describing three categories into which dismissals associated with labor organization activity must fall: "(1) Cases in which the employer asserts no legitimate ground for the discharge; (2) cases in which the employer's asserted justification for the discharge is a sham and no legitimate business justification for the discharge exists (pretextual firings); and (3) cases in which there is both a legitimate and an impermissable reason for the discharge (dual motive discharges)." The first two types of discharge constitute an unfair labor practice. The third type may or may not constitute an unfair labor practice.[199] Examples occurred in several states. In Maine, an arbitrator's reinstatement of a teacher because her dismissal was "partly motivated" by her union activity was upheld by a court. Restoration included lost wages.[200] Dismissal of an employee in Washington, on the other hand, was upheld even though he claimed antiunion motivation. The court found sufficient evidence of his inefficiency to conclude that he might have been discharged even absent his prounion stance. His claim was remanded to administrative proceedings to determine proper relief, however, which would protect both his and the employer's rights. The court articulated at some length the narrowing that has recently occurred in the traditional "in part" test which is used where a dual motive for the discharge exists. Antiunion bias now must be the "dominant" and/or "substantial motive" for dismissals to be reversed. (The so-called "Mt. Healthy Doctrine" established by the United States Supreme Court in 1977).[201] It is of interest to note that this line of reasoning permits courts to avoid ruling on the claims of bias. When they determine that the dismissal would have occurred at any rate, then the matter of bias—its presence or absence—becomes irrelevant and the courts do not reach the matter.

The Ninth Circuit Court of Appeals, however, did rule on the substance of alleged reprisal for union activity in finding that a teacher's dismissal was not protected by his union activity. He had been dismissed for, among other things, writing a caustic criticism of his supervisor. In his defense, he asserted that the communication was actually a grievance, hence to discipline him for filing it was a prohibited labor practice. The court observed that since most of the complaints cited in the letter referred to conduct cumulated over a long period of time, they fell outside of the collective bargaining agreement grievance procedure which required filing within fifteen days of the alleged occurrence. The court ruled that untimely grievance filing was not a fully protected right of a teacher for which no discipline could be exacted. The dismissal was upheld.[202]

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[199] Washington Pub. Employees' Ass'n v. Community College Dist. No. 9, 642 P.2d 1248, 1252 (Wash. Ct. App. 1982).

[200] Lisbon School Comm. v. Lisbon Educational Ass'n, 438 A.2d 239 (Me. 1981).

[201] Washington, *supra*, note 199 at 1253.

3.6a(7) General

Perhaps the best general statement regarding contract interpretation was that of an Indiana court in a case involving contract terms that provided both for the board's right to transfer employees involuntarily and an obligation to post notice of all vacancies to encourage volunteers to fill available positions. In failing to uphold the district's claim that the former provision gave it the right to dismiss an employee who refused an assignment that had not been posted, the court noted that "contracts are read as a whole and paragraphs or sections are not read alone . . . specific or special provisions prevail over general ones."[203]

The harmonizing role, then leads directly to the courts being very reluctant to examine the merits of an award, either to assess the validity of its interpretation to terms of the agreement or of its application of the law. A Pennsylvania court insisted the following: "The fact that [the] arbitrator . . . may have failed to properly perceive the question or erroneously resolved it, does not provide *justification for judicial interference*."[204]

3.6b Judicial Review of Awards

The stream of precedent in judicial review of labor relations disputes flowed in two directions during 1982: One was toward the well-established principle that aggrieved persons have a right to their day in court; the other was toward the reality that courts are neither eager to accept jurisdiction of such disputes nor sympathetic to claims that arbitrators' and other third-party administrative proceedings' dispositions are contrary to law. Simply stated, courts do not require administrative disposition of labor relations disputes to meet strict judicial standards. This practice is so pervasive across all jurisdictions—federal and state—that it may be fair to conclude that courts systematically discourage litigation. An Illinois court referred to the "long recognized overriding interest in finality inherent in the submission of a dispute over a bargaining agreement to arbitration."[205] A commonwealth court in Pennsylvania commented that, "submission to arbitration of public employee grievances arising out of the interpretation of provisions of a collective bargaining agreement is favored."[206] That state's supreme court noted dryly that "in labor disputes resolved by arbitration machinery, the less judicial participation the better."[207] Nevertheless, the cases keep coming, and the courts hear the parties out.

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[202] Boehm v. Foster, 670 F.2d 111 (9th Cir. 1982).

[203] Carpenter, *supra*, note 117 at 325, 326.

[204] West Chester, *supra*, note 153 at 825.

[205] Posen-Robbins, *supra*, note 149 at 29.

3.6b(1) Standard of Review

The foundation of judicial review is that the courts wholly accept the statutorily established administrative proceedings—from grievance filing to PERB review—as the best way to resolve disputes about collective bargaining agreements. Perhaps the concept most used to make this operational is the stance that if an arbitrator's award draws its "essence" from the terms of the agreement, it will be upheld, despite the fact that, however obvious, alternative or even more correct conclusions would have been equally plausible. Courts throughout the various states utilize similar terms to describe this commitment and the standard expected of the awards: "review of labor arbitrators' decision is highly circumscribed"; or "in any way rationally derived"; or "the product of a reasonable mind."[208] Courts in Pennsylvania, Illinois, Iowa and Wisconsin were blunt about it:[209]

> [Pennsylvania] It is determined that the subject matter of the dispute is encompassed within the terms of the bargaining agreement, the validity of the arbitrator's interpretation is not a matter of concern to the court; [Illinois] whether this court's opinion as to the proper interpretation of the clause may have been different from that of the arbitrator is of no consequence. The parties bargained for the arbitrator's interpretation and this is what they received; [Iowa] it is not the function of the court to determine whether the arbitrator has resolved the grievance correctly; [Wisconsin] we, therefore, must uphold the arbitrator's decision so long as it is within the bounds of the contract language regardless of whether we might have reached a different result under such language, and does not violate the law.

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[206] Aliquippa Educ. Ass'n v. School Dist. of the Borough of Aliquippa, 437 A.2d 1039, 1041 (Pa. Commw. Ct. 1981).

[207] Scranton Fed'n of Teachers Local 1147 v. Scranton School Dist., 444 A.2d 1144, 1147 (Pa. Super. Ct. 1982).

[208] Greater Johnstown, *supra*, note 197 at 789; Aliquippa, *supra*, note 206 at 1040; Harborcreek School Dist. v. Harborcreek Educ. Ass'n, 441 A.2d 807, 809 (Pa. Commw. Ct. 1982).

[209] Erie, *supra*, note 87 at 690; Fortney, *supra*, note 120 at 233; Cook Cty., *supra*, note 185 at 252; Dubuque, *supra*, note 191 at 852.

The burden of proof required to convince a court to depart from this a priori assumption is clearly reflected in the various ways that courts articulate the basis of their refusal to set awards aside. These often appear in terms such as "this court will uphold an arbitrator's award unless it is[210]

> [Michigan] a clear showing of error....
> [Pennsylvania] arbitrary, capricious, or illegal....
> [Ohio] clearly and convincingly foreign to employees' interests....
> [Wisconsin] a perverse misconstruction of a collective bargaining agreement....
> [Rhode Island] a manifest disregard of contractual provisions or a completely irrational result....
> [New York] arbitrary or capricious or constitutes an abuse of discretion or is affected by an error of law....
> [New Hampshire] gross error of law or abuse of discretion....
> [Oregon] egregious ... repugnant ... grossly erroneous ... palpably wrong....

In Oregon, the supreme court ruled that the same "restrictive test" for review at the agency level (thus tipping the balance toward upholding arbitrators' awards) also applied to review by a court, thus reducing the parameters of judicial jurisdiction.[211] A court in California reminded a district that filing for a PERB ruling in a dispute did not automatically confer exclusive jurisdiction over the dispute on the board. Court jurisdiction, cautioned the court, remained a matter for the courts (and the legislature) to determine.[212] A Kansas court clarified the standard of review in that state by placing all appeals into two categories: (1) Where the employer or the employee refuses to participate in arbitration; and (2) where either refuse to accept or implement an arbitrator's award for cause. In the former, stated the court, there is no judicial jurisdiction, the matter being exclusively reserved for administrative hearings. In the latter, however, court jurisdiction may be invoked.[213] In most disagreements arising out of interpretations of the contract and an arbitrator's disposition of the matter, this would reduce to a requirement to exhaust all administrative remedies prior to litigating.

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[210] Lansing, *supra*, note 36 at 65; Millcreek, *supra*, note 39 at 674; Ohio, *supra*, note 50 at 1338; Fortney, *supra*, note 120 at 229; Providence, *supra*, note 133 at 128; Rensselaer, *supra*, note 154 at 884; Watson, *supra*, note 176 at 419; Eugene Educ. Ass'n v. Eugene School Dist. 4J, 648 P.2d 60, 66 (Or. Ct. App. 1982).

[211] *Id.*, at 67.

[212] Modesto, *supra*, note 77 at 640.

[213] Topeka, *supra*, note 141 at 1008.

Standard of review was directly examined in a Vermont case in which the PERB had used a "substantial evidence" test in assessing a dismissed employee's appeal of the district's action. The court concluded that by using this test, rather than the broader "reasonable evidence" standards used in arbitration awards, it "abandoned neutrality and tilted towards the state; thereby depriving the grievant of due process."[214]

3.6b(2) Propriety of Awards

Propriety of the award is at the heart of all litigation contesting arbitrators' decisions. Despite the awesome burden of proof required to prevail over the legal presumptions underlying arbitration, seeking the upset of awards is not futile. Though upholding the arbitrator's decision, a court in Illinois reminded litigants that "if arbitrator's award does not draw its essence from the collective bargaining agreement, courts have no choice but to refuse enforcement of award."[215] In Massachusetts, a court accepted jurisdiction in a service-fee case cited earlier because the outcome would affect many "nonparties" to the current dispute.[216] In Rhode Island, a court ruled that a judicial de novo hearing was justified because the school committee had selected neither of the two statutorily designed routes for challenging a matter's arbitrability, had not participated in the arbitration that was carried forward by the teachers, yet had influenced the arbitrator via telephone (the teachers had lost the award).[217]

Whether the arbitrator exceeded his authority by failing to base the award on the terms of the agreement is the primary basis upon which awards are stayed or vacated. An Iowa arbitration based a ruling in favor of the teacher grievants in an extra duty assignment case on the procedural issues of how and when the assignments were made rather than whether the board had the authority under the contract to make the assignments in the first place. A trial court vacated the award, and the appellate court agreed, because

> if the matters on which the arbitrator had rested his decision had been within the scope of the issues which were submitted for arbitration, we would doubtless be without power to review the results of the arbitrator's decision . . . because we hold that the issue was not submitted, we are without reluctance to express our view that if, as found by the arbitrator, the

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[214] *In re* Grievance of Muzzey, 449 A.2d 970, 973 (Vt. 1982).

[215] Cook Cty., *supra*, note 185 at 252.

[216] Chariho, *supra*, note 18 at 184.

[217] NEA Hopkinton v. School Comm. of Hopkinton, 452 A.2d 1149 (R.I. 1982).

> subject matter [of the board's action] was not precluded by the master agreement, the actions are not otherwise improper.[218]

In Oregon, a district departed from its past practice (though not from contractual terms) in hiring persons for part-time coaching positions who were not members of the bargaining unit. The association claimed that the deviation had to be bargained. The board refused, citing management prerogatives. An arbitrator found no contractual violation but awarded the association relief on the basis that the board's refusal to bargain the matter was an unfair labor practice, bringing the matter within his jurisdiction. The employment relations board on review, reversed, finding that "the arbitrator's jurisdiction was limited to the contract by the document itself. We can say, then, with positive assurance, that the arbitrator exceeded his jurisdiction and authority in this case."[219] Both the trial and appellate courts agreed with the ERB despite the long-standing and strong precedent they cited indicating that arbitrators' decisions will be upheld unless the ruling is "so grossly erroneous as to strike at the heart of the decision-making process." They found just such an error in the award, agreeing with the ERB that "the arbitrator's conclusion that there had been no violation of the agreement divested him authority to make any award."[220] Regarding the association's contention that this aspect of the award was in error (a possibility that the ERB had raised, itself) the court replied that

> the simple answer is that the association entered into an agreement under which certain disputes are arbitrable. The association does not contend that the agreement's arbitration provision is inapplicable to the grievance it filed. The arbitration forum was of the association's and the district's choosing. Arbitration has certain advantages and disadvantages that are not common to other forums, but like any other forum, arbitration carries with it the inherent risk that the effective final decision-maker will be wrong. For reasons previously stated, we do not find the fact that the arbitrator may have been wrong here to be a basis for reversing his conclusion of law; and we also find that the fact is not a basis for remanding the matter to him to make a second decision which the association might consider right.[221]

Where the remedy fashioned included the arbitrator's retaining jurisdiction over the matter to oversee its implementation, a California court found that though such practice was well-set in both state law and terms of the agreement, it could be misused. In the dispute, a teacher had successfully grieved the district's having assigned someone else to teach a class. Both full restitution and priority for teaching the next such class were granted, with the arbitrator retaining jurisdiction on both matters to ensure an equitable settlement of the salary restitution and to ensure that preference was actually given, as directed. The district claimed in trial court that the retention of jurisdiction exceeded the arbitrator's authority, and the court agreed. An appellate court found that retention to oversee the determination of the back pay was justified, but retaining jurisdiction over giving the employee priority in subsequent assignments, was "unnecessary and improper. The remedy is self-executing. Therefore the retention of jurisdiction was surplusage and should be striken by the trial court."[222] In New York, on the other hand, an appellate court upheld a lower court's vacating of two arbitration awards on the basis that they contravened public policy. In each, the district had been ordered to pay employees for work done by volunteers. A vigorous dissent was filed.[223]

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[218] Dubuque, *supra*, note 191 at 853.
[219] Eugene, *supra*, note 210 at 63.
[220] *Id.* at 64.
[221] *Id.* at 68.

In Illinois, a district claimed that an award was not connected to the contract, was based on the arbitrator's mistaken belief that the agreement contained a past-practice clause, and that the award violated a provision in the contract itself. It also maintained that the arbitrator had interfered with the board's discretionary powers. At issue was the assignment of librarians to registration duties under contract terms which read, "duties of faculty members during registration period shall consist of counseling, programming, and other professionally related duties." The arbitrator found the language to be unclear and ambiguous as to its application to librarians, hence accepted jurisdiction and remedy, ultimately fashioning an award that exempted them from registration duties.[224] The court upheld the award.

Courts, as well, can exceed their authority by ruling on the merits of cases. It was found improper for a court in New York to have assessed the merits of a teacher-board dispute rather than limit itself to ruling on the arbitrability of the matter. The appellate court referred specifically to the fact that the grievance listed specific allegations of violations cross-referenced to specific contract terms. This made the matter one which could and should have been remanded to arbitration rather than judicial disposition.[225] An Indiana court was found to have exceeded its jurisdiction in vacating an award for an alleged error of law by the arbitrator. The appellate court based its decision on the principle that

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[222] San Jose Fed'n of Adult Educ. Teachers v. Superior Court of Santa Clara Cty., 183 Cal. Rptr. 410, 414 (Cal. Ct. App. 1982).

[223] Onteora Cent. School Dist. at Boiceville v. Onteora Nonteaching Employees' Ass'n, 452 N.Y.S.2d 22 (N.Y. App. Div. 1982).

[224] Cook Cty., *supra* note 185 at 250.

> generally an arbitrator's mistake of law or erroneous interpretation of law does not constitute an act in excess of the arbitrator's powers . . . ; manifest disregard of the law has been acknowledged to be an exception to the general rule that a mistake of law is not a ground upon which an award may be vacated. . . . Manifest disregard of law occurs when arbitrators understand and correctly state the law but proceed to disregard the same.[226]

A trial court in Washington also exceeded its authority to review an arbitrator's decision. Since no contractual or statutory authority could be found giving it authority to review the dispute, its hearing the case was found improper.[227] In Pennsylvania two arbitration awards which had been reversed by trial courts were reinstated. In one, bifurcated proceedings (arbitration first to determine the existence of a violation; arbitration a second time to establish the propriety of recovery) had been set aside. The appellate court restored the awards even though conceding that dual proceedings are frowned upon. The court was creative in clarifying how the compensation award for days lost would not be automatic once a finding of improper withholding by the district was determined. Rather, it reasoned, the award of a day's pay for the lost time was a "damage" assessment against the district for having been found in violation of the collective bargaining agreement.[228] In the other case, a district's refusal to base a coaching assignment strictly on seniority, per the terms of the contract, had been upheld by the trial court. Both the arbitrator and the appellate court agreed that the contract limited the district to the seniority standard alone, once all candidates were evaluated as being "satisfactory." The court reviewed the standard for judicial review of arbitration awards as follows: "Judicial inquiry into the arbitrability of a grievance is limited to a determination of (1) whether or not the parties entered into an agreement to arbitrate, and (2) whether or not the dispute falls within the arbitration clause."[229] No other considerations, accordingly, were found to be within the purview of a court.

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[225] Catharaugus, *supra*, note 159.

[226] Southwest Parke Educ. Ass'n v. Southwest Parke Commun. School Trustees Corp. Bd. of Trustees, 427 N.E.2d 1140, 1147 (Ind. Ct. App. 1981).

[227] Gray's Harbor Cty. v. Williamson, 634 P.2d 296 (Wash. 1981).

[228] Scranton, *supra*, note 207 at 1149.

[229] Scranton Fed'n of Teachers Local 1147 v. Scranton School Dist., 445 A.2d 260, 262 (Pa. Commw. Ct. 1982).

A Florida court vacated the award of an arbitrator who had ordered the removal of four letters from a dismissed teacher's personnel file then reinstated her because the file contained insufficient justification for her termination. The court found that the arbitrator had exceeded his authority by accepting and utilizing the teacher's request to remove "disputed materials." The court considered this so general that it prevented the board from objecting to the removal of specific items that were germane to its actions.[230]

In Montana, a trial court accepted jurisdiction in a nonrenewal dispute between the district and the state's board of personnel appeals. The supreme court found that the trial court had exceeded its scope of jurisdiction and had erred when it held that the district had

> the sole discretion not to renew the contracts of the two nontenured teachers; that the nonrenewal of their contracts were not a grievance under the collective bargaining agreement; and that the school district was without authority to bargain with the SEA regarding matters of inherent managerial prerogatives, including hiring and retention of employees.[231]

It then reinstated the personnel board's order, which had held that the contract only provided for arbitrator review of the procedure, not the substance, of evaluation:

> If the teacher was properly evaluated and the basis for the dismissal was discussed with the teacher, then the termination could be for good reason or a bad reason, so long as it was discussed with the teacher. As far as this Board can see, the school district has retained unfettered control over the reasons for dismissal of a non-tenured teacher.[232]

3.7 IMPASSE AND DISPUTE RESOLUTION

3.7(a) Factfinding and Arbitration

Though arbitration has a prognosis of resulting in relatively stable, no matter how unpredictable, outcomes, factfinding enjoys no such promise. A district in Wisconsin voluntarily submitted its projected dismissal of a teacher to a noncontractual factfinding process. Though the teacher voluntarily participated, he specifically reserved all rights under the collective bargaining agreement. After conducting two hearings, the factfinder recommended the teacher's dismissal based on verification of nine out of eleven allegations of improper conduct. Both parties then agreed to tripartite arbitration under the terms of the agreement, and the panel selected conducted a full factual hearing, interpreting the contract as permitting such action. By a vote of two to one, the panel did not sustain the charges, and ordered reinstatement. The district then appealed, claiming the arbitration panel had exceeded its authority, and ultimately learned in the supreme court's disposition of the case that an arbitrator can conduct a hearing to determine whether just cause exists if an agreement so provides. Conclusions of the factfinder were given no standing whatsoever to substitute for collective bargaining grievance procedures.[233]

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[230] Watson, *supra*, note 167 at 1056.

[231] Savage Pub. Schools v. Savage Educ. Ass'n, 647 P.2d 833, 834 (Mont. 1982).

[232] *Id.*

In California, where factfinding is part of the state's employment relations procedures, factfinding was at the center of a controversy that ultimately led to a strike and the filing and counter-filing of unfair labor practice charges by both the district and the union. The issue surrounded the question of whether the district could unilaterally adopt a combination of the terms of the factfinder's report and its own last best offer after declaring that negotiations were over and refusing to engage in post-factfinding mediation. A strike ensued and triggered a complex series of procedural and jurisdictional rulings regarding injunctions sought by all parties both from the PERB and from the courts. A trial court's issuance of a temporary restraining order against the district's refusal to reopen negotiations (as ordered by the PERB), while ruling that it did not have initial jurisdiction to enjoin the strike, was ultimately upheld. Lost along the way was a clear ruling on the status of the factfinder's report. Ordering the district to reopen negotiations suggests strongly, however, that factfinding does not terminate further negotiations. This conclusion must be moderated somewhat by noting that the rationale for ordering reopening of negotiations during the impasse was based solely on the general principle that doing so is required when either employer or employee concessions indicate a "significant shift in its negotiating posture."[234] Definitive disposition was not made of the district's unilateral adoption of certain factfinder recommendations in the same manner as the statute provides for district implementation of its last best offer during impasse. The emphasis throughout the discussion of the appellate court was that under the statutes, the district was empowered only to implement its last best offer; any substantial departure from them, presumably even those fashioned by a factfinder, would not be permitted.

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233. Fortney, *supra*, note 120 at 233.
234. Modesto, *supra*, note 77 at 646.

3.7b Rights on Expiration of Contract

Contract theory indicates unequivocally that upon the expiration of a contract, its terms are of no effect. However, applied to date-certain expiration of labor agreements, the principle has of necessity experienced substantial modification. Otherwise, the parties would be required to start with a blank slate at every contract rebargaining, and the continuity of employment rights and obligations, pay schedules, fringe benefits, and other matters critical to the smooth functioning of the organization would be broken. This would be awkward, at best; disastrous at worst. The traditional solution for the problem is to carry the expired contract's terms foward even though they technically no longer exist. From time to time such continuation is written into agreements, even though, according to one court, "it is a well established rule of labor law that an employer may not unilaterally alter the terms and conditions of employment after the expiration of a collective bargaining agreement."[235] In addition, much of the pressure to replace an old agreement with an entirely new one is alleviated by the practice of making new terms retroactive to the expiration of the old agreement.

Problems are not unusual, for there are exceptions to the general rule. For instance the employer may unilaterally change the terms of an expired agreement where (1) bargaining has reached impasse; (2) the union has waived its right to insist on bargaining over the alterations; and (3) the change is required by law.[236] In addition, factors outside the control of either boards or employee organizations sometimes compel changes. Increases in health insurance premiums after the expiration of the agreement and during negotiations in a Delaware district, for instance, resulted in litigation because the district did not "pick up" the added cost. Instead it passed it on to individual subscribers. The union's request for an injunction to compel district payment of the new fee was denied because issuing it would have been "meddlesome" and an "unwarranted interference" in a dispute where the amounts of money were relatively small.[237]

In California, a court reviewed the board's options during impasse as follows: "Once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. . . . The employer need not implement changes *absolutely identical* with its last offer on a given issue. However the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals."[238] Inasmuch as the court found the district's unilateral adoptions to have departed substantially from its last best offer, its action was found to have been properly enjoined.

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[235] Lane v. Board of Dirs. of Maine School Admin. Dist. No. 8, 447 A.2d 806, 809 (Me. 1982).

[236] *Id.* at 810.

[237] New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ. of New Castle Cty. Voc.-Tech. School Dist., 451 A.2d 1156 (Del. Ch. 1982).

A Maine court refused to consider a board's refusal to grant a nontenured teacher a pretermination hearing as violating an agreement which had expired prior to the beginning of the teacher's current employment. It found that "unilateral alteration of the terms of a collective bargaining agreement after the expiration of that agreement does not result, under the circumstances of this case, in a breach of contract."[239] A job security dispute in New York was remanded to the arbitration process, even though the collective bargaining agreement had expired. The court found that only the effects of the board's decision occured after the expiration; hence "the duty to arbitrate a dispute arising during the term of a collective bargaining agreement survives the contract."[240]

Expiration, however, can have nonbeneficial outcomes to employees. A New York district was not required to comply with an expired contract's provisions regarding salary increments. The court viewed the matter as follows:

> Recognition must be given to the ability or the lack thereof of public employers to meet increased money demands after the expiration of a contract providing for such increases during its tenure. To hold otherwise and make incremental payments, as distinguished from other contract provisions, mandatory during the period between the expiration of one contract and the execution of a successor agreement, even where, as here, the expired contract contained a survivorship clause, does not operate to preserve an existing relationship between the parties, but extends that relationship and gives the association an edge that makes negotiation of annual salary increments that much more difficult.[241]

3.8 CONCERTED ACTIVITY

3.8a Strikes

Due to a combination of reasons, not the least of which must have been the general state of the economy, strikes in general were not big news during 1982. In education, things were no different. However, litigation regarding strikes of a few years past made its way into judicial consideration during the year with the result that courts had a number of occasions to explain their attitude toward them. Largely, the outcomes were a reiteration of the fundamental principle that public employees have no common law right to strike. A court in Kentucky so reminded litigants of this "truth" even though a strike was not at issue.[242] In Alaska, however, the matter was the central issue between striking teachers and legislation specifically exempting them from a limited right to strike law. The school district was successful in obtaining a temporary restraining order and a direction for the teachers to return to work. The court ruled that without expressed statutory permission, teachers (or any other public employees) have no right to strike, hence justifying the injunction.[243] A California court came to the same conclusion, finding that though the state's employment relations act "does not prohibit strikes by public education employees, it expressedly withholds authorization for such strikes. . . . It is apparent that EERA leaves public employees subject to existing case law prohibiting public employee strikes."[244] Strike illegality was found sufficiently evidence in another district in the state to justify the PERB's conditioning an injunction against the baord's refusal to resume bargaining during an impasse on the teachers' returning to work. The strike, itself, was not a major factor in the decision.[245]

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[238] Modesto, *supra*, note 77 at 647.

[239] Lane, *supra*, note 235 at 809.

[240] Dickinson v. Homer Teachers' Ass'n, 445 N.Y.S.2d 35, 37 (N.Y. App. Div. 1981).

[241] Maplewood-Colonie Common School Dist. v. Maplewood Teachers' Ass'n, 445 N.Y.S.2d 267, 269 (N.Y. App. Div. 1981).

Though the presence of a strike would seem self-defining, disputes can arise over whether an employee action constitutes illegal activity. In New York, the simultaneous sick calls of six custodians were found to be sufficiently unusual to meet a "substantial evidence" test that an illegal work stoppage had occurred.[246]

3.8b Enforcement Actions

Though the injunction would seem to be the most swift and certain device to prevent the abrogation of strike prohibitions, their issuance is not often the center of litigation arising from such actions. When used, however, the standard necessary to obtain one varies somewhat. A chancery court in Deleware declined to enjoin a district's passing a health insurance rate increase on to teachers during a negotiations impasse partially because the district's action would not result in

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[242] Fayette Cty., *supra*, note 32.

[243] Anchorage, *supra*, note 24.

[244] El Rancho, *supra*, note 42 at 813, 814.

[245] Modesto, *supra*, note 77.

[246] Smith v. Bloom, 445 N.Y.S.2d 46 (N.Y. App. Div. 1981).

"irreparable harm" to the teachers in light of the small amounts of money involved. The court defined the standard necessary to warrant an injunction as follows:

> Clearly, it is not necessary that a wrong should have actually been committed before a court of equity interferes, since such a requirement should, in most cases, defeat the purpose for which relief is sought. . . . The threat of an illegal action, such as an illegal strike, must be imminent in order to justify injunctive relief.[247]

According to the Alaska Supreme Court, most jurisdictions impose a similar standard.[248] In California, however, a court expanded it by indicating a willingness to enjoin where an employer's or employees' action "would render any final order of the PERB meaningless."[249]

Though allegations of improperly issued injunctions, either by PERBs or by courts, often are involved as peripheral issues in litigation, their issuance, per se is seldom the central issue by the time a case makes its way into a court of record. By then, the substantive matters typically attract most of the attention. The California case cited immediately above was an exception because its fact background included no less than five injunctions and many subsequent modifications, issued either by a court or by the PERB. The ultimate disposition generally found that a court should avoid injunctions in labor relations disputes. The appellate court greatly approved of the trial court's admission of inexpertise in such matters and its willingness to follow the lead of the PERB:

> This concession by the trial court amply exemplifies the need to defer to the expertise of the PERB so it can perform its mandated duty to effectuate and implement the purposes and policies of the EERA—that is, to promote the improvement of personnel management and employer-employee relations within the public school systems of California.[250]

The court then outlined the standards on which an injunction in such a dispute could be based (quoting an earlier state supreme court decision):

> The court may properly consider any fact relevant to the question whether the requested relief is just and proper, including the nature of the alleged unfair labor practice (*i.e.*, whether it is violent, coercive, etc., and whether it is ongoing or consisted of a single act), its probable effect in relation to the status quo and the statutory objectives, the nature of the relief sought, the

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[247] New Castle Cty., *supra*, note 237.

[248] Anchorage, *supra*, note 24 at 998.

[249] Modesto, *supra*, note 77 at 649.

[250] *Id.* at 642.

> timing of the request, the circumstances of the parties, and the probable effects upon them of the order requested.[251]

Another court in the state ruled similarly, finding that neither a board nor an employees' association can grant jurisdiction to a court or other tribunal simply by asking it to enjoin. Neither can a court or other tribunal acquire jurisdiction by granting such a request.[252]

An injunction was at the center of a dispute in Connecticut, where state law had provided for the issuance of automatic ex parte injunctions against teacher strikes (but not those of other public employees). When the teacher in New Haven went on strike in 1975, an injunction was issued pursuant to the law and resulted in fines and jail sentences being levied against both individual teachers and their Association for failing to "purge" themselves of contempt by returning to work as ordered by the court. They claimed in litigation that applying the automatic ex parte provision solely to teachers was a denial of equal protection of the laws. They also claimed that public remarks made by the presiding judge in the contempt citations effectively disqualified him from being able to hear their cases fairly. The supreme court was able to avoid ruling on the constitutional issue inasmuch as the statute had been amended to delete the provision in question by the time the case was being heard. In examining the charges of judicial disqualification, the court found that public statements made by the judge in a newspaper interview indicated his inability to provide an impartial hearing. The penalties against the teachers were therefore set aside and the matter remanded for rehearing. As far as the large issue of establishing the basis upon which injunctions should be issued, the court upheld the principle that injunctions may be issued and harsh penalties can be levied for violating them, even though the facts of the instant case indicated that "it may be a better practice, as the defendants suggest, for the court to impose civil contempt penalties in increasingly harsh stages so as to increase the pressure on the contemnor."[253]

Predisposition of differing standards for issuing an injunction depending upon whether it would benefit the employer or the employees was suggested by an Oregon appellate court which declined to support a trial court's enjoining of arbitration on whether the district had properly utilized the evaluation procedures covered in the collective bargaining agreement. It had successfully argued in trial court that requiring it to arbitrate the matter would erode fundamental rights belonging exclusively to the board. In reversing, however, the appellate court said "we conclude that the District has failed to show any irreparable injury that would justify judicial intrusion in this case."[254]

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[251] *Id.* at 648.

[252] El Rancho, *supra*, note 42 at 812.

[253] Papa v. New Haven Fed'n of Teachers, 444 A.2d 196, 203 (Conn. 1982).

Injunctions are not the only response that is made to illegal work stoppage or other concerted action. Less drastic measures are more often taken, the most common being to withhold wages and/or fringe benefits for days not worked, a penalty that is virtually self-executing. In Pennsylvania, a dispute arose over a PERB settlement of a strike which called for 183 days of paid work after a strike in the mid-1970s. A state statute, however, prohibited paying any public employee for the period of any strike, and the district disputed the order. Though the merits were not resolved by the court, it ruled definitively that the dispute over the day of pay that was being contested was a proper subject of arbitration, and ordered the district to submit it to the grievance procedure.[255] On the other hand, a court in California ruled that the PERB is not the appropriate forum to determine alleged damages due a district from a teacher strike. Such determinations, ruled the court, are properly in the jurisdiction of the judicial system.[256] In a New York federal court, a teacher attempted to have two days' wages that were withheld as a fine for participating in an illegal strike restroed. He had used the state's consumer credit act's proscription against garnishment as a cause for action, but the court denied the claim, affirming prior rulings that such fines are legitimate.[257] This decision is in concert with others in that state upholding the constitutionality of monetarily penalizing teachers who engage in illegal strikes.[258]

In an issue related to monetary penalties for striking, a New York court has ruled that withholding taxes due on wages deducted as a penalty for participating in a strike were not required to be collected within ninety days of the payment of the wages, as required by the statutes. It is of interest that the court approved requiring taxes to be paid on the withheld wages, however. Thus, they had to be paid over and above the reduced wages already received. The court considered the wages as having actually been paid, then returned as fines.[259]

Although damages in torts would seem foreclosed by the tradition in National Labor Relations actions, one court in California has left the matter in some doubt. A district, in response to a strike, filed claims against the union for over two million dollars in actual and ten million in punitive damages. The trial court dismissed the action for want of jurisdiction. Upon appeal, however, the dismissal was reversed, the appellate court finding ample precedent in the state for judicial jurisdiction under the state's employment relations act. Thus, the question of the damages, if any, is still to be determined.[260] In another California district, the board filed a suit both in torts and in contract violation in response to a teacher strike. The trial court dismissed both claims, but the appellate court reversed on the second cause, the contract violation. It did not equivocate on the tort claim, however, revealing its prognosis for the success of such claims by quoting with approval an earlier court decision in an NLRB case: "[T]he tort action goes to the essence of labor law—the right to strike. The very fabric of the NLRA would be destroyed if such suits could be maintained."[261]

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[254] School Dist. No. 1 of Multnomah Cty. v. Portland Teachers' Ass'n, 646 P.2d 657, 658 (Or. Ct. App. 1982).

[255] Pennsylvania, *supra*, note 136.

[256] Fresno Unified School Dist. v. National Educ. Ass'n, 177 Cal. Rptr. 888, 897 (Cal. Ct. App. 1981).

[257] Kornit v. Board of Educ. of Plainview Old-Bethpage, 677 F.2d 13 (2d Cir. 1982).

[258] O'Connor, *supra*, note 20; Buffalo, *supra*, note 21; Wolkenstein, *supra*, note 22.

[259] Tepper v. Wyandanch Union School Dist., 451 N.Y.S.2d 435 (N.Y. App. Div. 1982).

3.9 MISCELLANEOUS DECISIONS

It would be an insurmountable task to review all the PERB rulings dispensed during 1982. Reading such a summary would seem even more arduous. Inasmuch as charges of unfair labor practices and rulings on them by arbitrators more often than not presage litigation, examples of virtually every known classification of prohibited practice can be deduced from the issues in dispute in the various cases reviewed. A small number of "miscellaneous" decisions came down during the year, however, which do not fit well into the chapter's topic headings. They are no less interesting because of their uniqueness.

After bids on new construction came in surprisingly high, a school board in New Jersey undertook to complete a major portion of a new auditorium and library construction itself, using district employees and temporary labor as needed. Funding came from the proceeds of a bond issue that had been arranged pursuant to state law. A temporary employee who had been hired as a mason, then discharged upon completion of his work, challenged the district's wage scale, which was less than that paid by private contractors for comparable work. He cited the state's prevailing wage act, which required comparable wages among contractors, as his cause for action. The court found the act inapplicable to public employers by its own terms, and evaluated the claim that the district was encompased under its terms by having "contracted with itself" as, "patently without merit."[262]

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[260] El Rancho, *supra*, note 42.

[261] Fresno, *supra*, note 256 at 893.

[262] Thomas v. Teaneck Bd. of Educ., 446 A.2d 547, 549 (N.J. Super. Ct. 1982).

In Wisconsin, an attorney became enmeshed in a tangled web of competing loyalties and ended up being found disqualified to serve as a hearing examiner in a case. Over the ten years that the case dragged on, he had at one time or another acted in the following capacities: (1) As the employer's counsel in general labor-related matters during the time the original grievance had been filed; (2) as a staff attorney in the state's attorney general's office representing the WERC in a state supreme court hearing on whether the Commission had initial jurisdiction in the grievance; (3) as a member of the WERC panel that reversed the arbitrator's award in favor of the grievant; (4) as a candidate negotiating to return to the attorney general's office during the time the award was being reviewed; and (5) as representative of the employer in labor relations matters upon his return to the attorney general's office. Though there was neither contention nor evidence that he "stood to profit in any way from his decision in the case," the plaintiff contended that, taken together, these were sufficiently irregular to cast doubt on his capability to have heard the employer's appeal of the arbitrator's award impartially. The court agreed, amplifying the appropriate standard as follows:

> This court holds that where a compelling appearance of impropriety on the part of an administrative judge is present, that administrative judge should be disqualified. A compelling appearance of impropriety may be proved by a single egregious act which creates severe suspicion of the administrative procedure. It may also exist where a number of acts, not individually as egregious in nature, together have a cumulative impact of eroding public trust in an administrative agency. We do not hold that every showing of the appearance of impropriety should disqualify an administrative judge. The particular facts of each individual case will determine whether the appearance of impropriety is so compelling that it must result in the disqualification of the administrative judge.[263]

This chapter began with the contention that the opportunities for dispute (and litigation) in labor relations seem endless. As if courts' being asked to determine whether death is the "ultimate retirement," whether one teacher can constitute a bargaining unit, or whether the recognized unit can have the superintendent as its president are not sufficiently representative of endlessness, one last case will be offered to prove the point.

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263. Guthrie v. Wisconsin Employment Rels. Comm'n, 320 N.W.2d 213, 218 (Wis. Ct. App. 1982).

A teacher in Florida found herself in the middle of a power struggle between the superintendent and the board. The latter directed her to report to teach in one school and the former directed her to teach in another. During a four month period while she reported dutifully to the school indicated by the board, the superintendent refused to sign her salary warrants, thwarting the negotiation of her pay checks. Seeing no end to the matter, she sued to recover lost wages under appropriate state statutes. She prevailed, but her request for the $6,000 in attorney's fees it required for her to recover the $4,000 in wages she sought was initially turned aside. Although she was unsuccessful in obtaining judgment against the superintendent for "milicious interference with a contractual relationship," she was awarded the legal fees by an appellate court which found that "in enacting Section 448.08 the Legislature intended to avoid the inequity which would result if an employee were required to pay her own attorney's fees in actions for unpaid wages."[264]

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[264] Doyal v. School Bd. of Liberty Cty., 415 So. 2d 791, 793 (Fla. Ct. App. 1982).

4

PUPILS

Henry S. Lufler, Jr.*

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*The author wishes to thank William B. Rowland for his assistance in gathering materials for this chapter.

4.0 INTRODUCTION

Courts continue to make decisions about almost every aspect of pupil treatment. Cases involving pupils increased by one-third last year with much of the increase attributable to litigation concerning the rights of handicapped students. A 1982 United States Supreme Court case defining the Congressional mandate of an "appropriate education" to be provided such students and also limiting the role of lower courts to review placement decisions may help reduce the controversy in this area. Two dozen cases in which attorneys sought fees and damages for representing handicapped children were recorded, with mixed results, suggesting that fees will be the subject of further litigation next year.

A muddled United States Supreme Court decision on school library book removal did little to resolve the confusing issues in this first amendment area. The use of sniff dogs in school drug searches was also subject of conflicting decisions. "Moments of silence" as an alternative to school prayer and laws requiring the teaching of "creation science" found little support in federal courts, illustrating that courts can definitively address at least some issues. Costly desegregation litigation continued, with little resolution of outstanding issues.

4.1 HANDICAPPED AND EXCEPTIONAL CHILDREN

In 1982 the Supreme Court heard its first case involving the requirements of the Education for All Handicapped Children Act of 1975 (EHCA).[1] At issue was a federal court decision, upheld by the Second Circuit Court of Appeals in a divided vote, requiring that a deaf child be provided with a sign language interpreter in her elementary school classroom.[2] The Supreme Court, concluding that this costly service was beyond the scope of the Act's requirements, addressed two of the questions which have dominated the mushrooming litigation in this area: What is meant by EHCA's requirement that handicapped students receive a "free appropriate public education," and what is the role of the courts in reviewing a handicapped student's placement or program under the terms of EHCA?

The case began when the parents of Amy Rowley, then in the first grade, challenged the "individualized educational plan" (IEP) prepared for her by the Furnace Woods School in the Hendrick Hudson

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[1] Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 102 S. Ct. 3034 (1982).

[2] Rowley v. Board of Educ. of Hendrick Hudson Cent. School Dist., 483 F. Supp. 528 (S.D.N.Y. 1980); *aff'd*, 632 F.2d 945 (2d Cir. 1980).

Central School District, Peekskill, New York. The IEP provided that Amy should be educated in a regular classroom, using an FM hearing aid and receiving instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. In addition, school staff had attended a course in sign language interpretation and a teletype machine had been installed in the principal's office to permit the school to communicate with Amy's parents who are also deaf. Amy's parents, however, asked that she be provided with a sign language interpreter for her academic classes. The school system declined to do so and the suit resulted.

The district court found that Amy "performs better than the average child in her class and is advancing easily from grade to grade."[3] The court concluded, however, that she was not performing as well as she would have without her handicap and that EHCA required that she be provided "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[4] The court also concluded that the responsibility for determining what constituted an "appropriate education" under EHCA had been left "entirely to the federal courts and the hearing officers."[5] The Court of Appeals for the Second Circuit affirmed and the Supreme Court was left to decide the role of the courts and whether "appropriate education" meant achievement of full potential.

Justice Rehnquist, writing for the five person majority, first tackled the question of what "free appropriate education" was intended to mean by the Congress which had passed EHCA. Finding the definition contained in the Act to tend "toward the cryptic rather than the comprehensive,"[6] he returned to congressional documents and debate to help define the term. There he found distinctions between handicapped students who were "served" by their school system and those who were "unserved." He also found reference to a "basic floor of opportunity" for handicapped children. Thus he concluded that EHCA requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[7] Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. The IEP must be "reasonably calculated" to enable the child to achieve passing marks and advance from grade to grade.[8] The Court majority concluded that Amy was receiving such a program, noting that she clearly was benefiting from her instruction.

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[3] *Id.* at 534.

[4] *Id.*

[5] *Id.* at 533.

[6] Rowley, *supra*, note 1 at 3041.

[7] *Id.* at 3048.

Turning to the second question, the majority rejected the contention that courts should review each case de novo. Instead, courts should ensure that the state has complied with EHCA procedures, such as those requiring parental involvement in IEP development, and then that the IEP be calculated to enable the child to receive educational benefits. If these terms are met, "the courts can require no more."[9]

Justice Blackmun, in a concurring opinion, argued that EHCA required that handicapped children be provided with "equal educational opportunity." He argued that Amy's program provided such an opportunity and voted to overrule the lower courts on that ground. Justice White, joined by Justices Brennan and Marshall, dissented, concluding that EHCA required more than mere "access" to specialized instruction, noting that "a teacher with a loud voice" would satisfy such a requirement.[10] Instead, they argued that Amy would obviously have a greater opportunity to learn with an interpreter. The dissenting opinion, then, took the position that EHCA required equal educational opportunity, rather than just some level of educational benefit, and that the interpreter was required. They also cautioned that the Court's decision would make it much harder for parents to challenge an IEP.

The effect of *Rowley* on the flood of litigation in this area remains to be seen. Clearly, Amy had received significant special services and was performing well academically. It is doubteful, therefore, that the decision could be read as carte blanche support for any IEP developed for a handicapped child. At the same time, as demonstrated in the discussion of other cases in this area which follows, the case should help reduce the contradictory decisions rendered by lower courts on the extent to which extraordinary services must be provided to handicapped students.

4.1a Tuition and Assignment

Cases involving the payment of tuition for handicapped children, often at costly residential schools, generally fall into two categories. In the first group to be discussed, litigation resulted when a student was moved from one educational placement to another while the administrative appeal process contained in EHCA to determine placement still was underway. In the second group are cases in which school districts argue that parents or another governmental agency should pay the tuition because the student's disability is not "educational" in nature.

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[8] *Id.* at 3049.

[9] *Id.* at 3051.

[10] *Id.* at 3055.

EHCA contains a provision[11] which has come to be called the "stay-put" requirement. EHCA provides a detailed administrative timetable for challenges to a student's educational placement—a formal due process hearing within forty-five days and state review of the decision within thirty days if it is requested. Students are required to remain in their original placement while the process is being followed. Many challenges, however, take longer than the timetable specifies and lawsuits concerning the payment of tuition during the appeals process are common.

The United States Supreme Court helped clarify the "stay-put" requirement by letting stand a Fourth Circuit Court of Appeals decision denying parents reimbursement for tuition when they unilaterally moved their handicapped child to a private school before any administrative hearing had been held.[12] Other recent cases have offered the same interpretation of the EHCA section. The Third Circuit Court of Appeals rejected the claim by a Delaware school district that they did not have to pay for the tuition of a student enrolled in a private school.[13] The district had sought to return the student to a public school placement and the parents appealed. The student ultimately was enrolled in the public school but the district refused to pay the tuition which was charged for the period while the appeal was taken. The appeals court concluded, however, that the district's obligation to pay the tuition was clear.

The Second Circuit Court of Appeals decision also affirmed the "stay-put" requirement.[14] A New York City student had been placed in a Connecticut residential treatment facility which was subsequently removed from New York State's list of "approved" institutions. While an alternative placement was being sought, and while arguments were raised concerning the nature of the student's handicaps, the New York city and state defendants sought to deny tuition to the student. The court of appeals rejected the attempt and affirmed the preliminary injunction ordering the continued payment which had been issued by a lower court.

In a similar case, an Illinois district court issued a preliminary injunction requiring enough residential facility tuition be paid so that a student would not be discharged while claims raised under EHCA were being litigated.[15] A state appeals court later ruled that EHCA required the payment of the full cost of residential treatment.[16] Illinois had sought to charge the parents part of the fee on the grounds that some of the services received by the student were not "educational."

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[11] 20 U.S.C. § 1415(e)(3) (1976).

[12] Stemple v. Board of Educ. Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

[13] Grymes v. Madden, 672 F.2d 321 (3d Cir 1982).

[14] Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982).

[15] Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982).

The same Illinois district court ruled, in separate litigation, that parents could not recover tuition costs when they moved their behaviorally handicapped child to a private institution while challenging a proposed placement.[17] A California appeals court also rejected the claims for tuition made by parents who had unilaterally moved their child from one private school to another.[18] And in Massachusetts, an appeals court ordered the payment of residential tuition when parents did not receive formal notice tht the district no longer considered the student to be under their jurisdiction.[19] The court concluded that no change in placement could occur without due process. A New York court also ordered the payment of tuition for a student enrolled in a private school when the parents had not received proper notice of the student's educational evaluation.[20]

Taken as a whole, these cases involving the "stay-put" requirement while placement appeals are being made speak with one voice. Neither parents nor school systems can change placements while due process proceedings are in progress. Only when a system ignores the required proceedings are parents able to claim reimbursement for placements of their own choosing.

Other tuition cases involved disputes over which unit of government was responsible for expensive specialized care for handicapped children. The Stoughton, Massachusetts, school committee challenged a state appeals bureau decision requiring the committee to pay the day portion of tuition for a handicapped high school student.[21] The district court concluded that the committee had an obligation to pay the tuition since it had failed to design an appropriate program for the student. In a comment somewhat at variance with the cases just reported, the court concluded, "Congress did not intend to create a system that would cause a child to stay mired in an inappropriate program while the appellate mechanism slowly determined his fate."[22] An Illinois court also awarded tuition to parents who placed their child in a residential facility before receiving official approval.[23]

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16. Parks v. Illinois Dep't of Mental Health, 441 N.E.2d 1209 (Ill. App. Ct. 1982).
17. Mark R. v. Board of Educ., Bremen Commun. High School Dist., 546 F. Supp. 1027 (N.D. Ill. 1982).
18. Newport-Mesa Unified School Dist. v. Hubert, 183 Cal. Rptr. 334 (Cal. Ct. App. 1982).
19. Commonwealth v. School Comm. of Blackstone Valley, 432 N.E.2d 726 (Mass. App. Ct. 1982).
20. New York City Bd. of Educ. v. Ambach, 452 N.Y.S.2d 731 (N.Y. App. Div. 1982).
21. Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707 (D. Mass. 1982).
22. *Id.* at 713.
23. Walker v. Cronin, 438 N.E.2d 582 (Ill. App. Ct. 1982).

Connecticut sought to avoid payment of tuition for an emotionally disturbed student enrolled in a Massachusetts residential facility, arguing that the placement was for "noneducational reasons."[24] The district court concluded, however, that the institution provided the environment needed for the student to gain needed educational skills and ordered the payment. Finally, in the first of three New York cases, a court of appeals held that the commissioner of education had the power to set tuition rates for schools which had contracted with the state to provide such services.[25] Another appeals court held that parents had to submit claims for tuition reimbursement within the school year for which they were requested,[26] and a third ruled that the New York commissioner could require counties to pay additional residential tuition by promulgating a new rate structure in mid-year.[27] A New York federal district court also ruled that a letter to parents from the school board's attorney was sufficient notice that tuition reimbursement for a private placement was being denied.[28]

Assignment cases involve disputes between parents and schools over the appropriate method of instruction for the handicapped child. Sometimes the disagreement centers on whether residential placement is needed or whether some form of mainstreaming would provide the child with a more "appropriate" education. Parents occasionally contest the IEP prepared for their child, sending courts into lengthy hearings on a particular handicapping condition. While placement cases have not declined in absolute numbers, there is a trend toward acceptance of "reasonable" programs designed for handicapped students (following *Rowley*), rather than the "best."

The First Circuit Court of Appeals held that the *Rowley* issues of "appropriate" or "best" education were not controlling in a case involving the placement of a Massachusetts handicapped child in a residential facility.[29] The child, who suffered from Down's Syndrome, had been institutionalized when a lower court ruled that Massachusetts law clearly required institutionalization. The question of whether or not the state would be required to pay the tuition while the appeal was pending was remanded to the district court.

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[24] Papacoda v. State of Connecticut, 528 F. Supp. 68 (D. Conn. 1981).

[25] Organization to Assure Servs. for Exceptional Students, Inc. v. Ambach, 449 N.Y.S.2d 952 (N.Y. App. Div. 1982).

[26] McGaw v. Huntington Hospital, 454 N.Y.S.2d 539 (N.Y. App. Div. 1982).

[27] Alban v. County of Nassau, 455 N.Y.S.2d 379 (N.Y. App. Div. 1982).

[28] Gregg B. v. Board of Educ. of Lawrence School Dist., 535 F. Supp. 1333 (E.D.N.Y. 1982).

[29] Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982).

The Sixth Circuit Court of Appeals heard a dispute centering on two alternative methods for instructing a deaf child.[30] The parents argued that their child would best be served by instruction relying on lip reading, the "aural-oral method." The school system had proposed a "total" approach which also involved the use of sign language. After considering the merits of both approaches, the appeals court affirmed the school district's "total approach" plan, while holding out the possibility that a change might be needed if the student failed to develop needed speech communication skills because of an overreliance on signing. A Pennsylvania district court reached the opposite conclusion in a similar case, ruling that a deaf student should not be mainstreamed and forced to use the aural-oral method until acquiring additional skills.[31]

Litigation continued in the case of a profoundly deaf Arkansas student, whom the Arkansas Department of Education argued would receive an "appropriate education" if the Springdale School District provided her with a certified teacher of the deaf. The district contended that the student would receive the "best" education possible at the state school for the deaf. The district court concluded that the student should be mainstreamed and that EHCA required the local placement.[32] The Eighth Circuit Court of Appeals affirmed[33] but the Supreme Court vacated and remanded the decision,[34] asking that it be viewed in light of *Rowley*. The Eighth Circuit reaffirmed its original decision in a brief order, holding that the local placement would best provide the student with an appropriate education.[35] Further litigation in the case is likely.

A Texas district court was asked to order residential treatment for a severely handicapped child while the school system had proposed a program within the public schools.[36] The child, whom the parents claimed was autistic, had been educated in a residential facility. The school system believed the child was severely retarded and argued that she would make greater educational progress within the system's programs. In resolving these conflicting positions in favor of the system, the judge acknowledged the "excessive expenditure" involved in residential placement which might deny needed services to other handicapped students. In addition, the court noted the general purpose of EHCA which was to promote mainstreaming whenever possible. The court did, however, order the district to prepare a twelve month program for the student, though no summer program presently exists within the district. In addition, the district was ordered to provide the parents with training to handle their child at home as well as counseling to reduce their emotional stress.

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[30] Age v. Bullitt Cty. Pub. Schools, 673 F.2d 141 (6th Cir. 1982). A Pennsylvania court facing the same issue reached an identical conclusion in Silvio v. Commonwealth, 439 A.2d 893 (Pa. Commw. Ct. 1982).

[31] Grkman v. Scanlon, 528 F. Supp. 1032 (W.D. Pa. 1981). This case has since been reversed by the Sixth Circuit Court of Appeals but the opinion is not yet available.

[32] Springdale School Dist. v. Grace, 494 F. Supp. 266 (W.D. Ark. 1980).

[33] Springdale School Dist. v. Grace, 656 F.2d 300 (8th Cir. 1981).

[34] Springdale School Dist. v. Grace, 102 S. Ct. 3504 (1982).

[35] Springdale School Dist. v. Grace, 693 F.2d 41 (8th Cir. 1982).

[36] Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982).

Mainstreaming was also preferred by a Massachusetts federal court in a case involving a retarded, mentally ill and epileptic student.[37] The student had been institutionalized for eight years, but the school committee proposed to provide a special program within the public schools. Drawing heavily on *Rowley*, the court concluded that the student would benefit from and receive an "appropriate" education in the local setting. The parents did receive reimbursement of tuition costs for the period while they were contesting the new IEP prepared for the child.

Deinstitutionalization was also favored by a federal judge in a case involving the Pennhurst State School.[38] Pennhurst has been the subject of continuing litigation since it was first determined in 1977 that the constitutional and statutory rights of residents had been violated. In 1980 a hearing master was appointed and was directed to work toward community placement of those at Pennhurst. While a United States Supreme Court decision[39] remanding the case has continued the litigation, the district court concluded that placement issues could be resolved while other matter were the subject of judicial review. In looking at the case at hand, the court concluded that the master appropriately decided that an institutionalized retarded child could obtain more beneficial servies in a community living arrangement, in spite of his parent's claim that continued institutionalization was needed. The court also refused to stay its order pending appeal.[40]

A North Carolina court approved mainstreaming for a hearing impaired sixth grade student, though the parents favored an out-of-state residential facility.[41] Of special interest in this case were claims made by the parents that a member of the panel which prepared the student's IEP was biased in favor of mainstreaming. The court concluded that subsequent state review of the decision and the opportunity provided the parents to present their own perspective meant that the panel member's perspective did not constitute sufficient bias to violate due process requirements. Citing *Rowley*, the court approved the mainstreaming plan.

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[37] Lang v. Braintree School Comm., 545 F. Supp. 1221 (D. Mass. 1982).

[38] Halderman v. Pennhurst State School and Hospital, 533 F. Supp. 660 (E.D. Pa. 1982).

[39] Halderman v. Pennhurst State School and Hospital, 451 U.S. 1 (1981).

[40] Halderman, *supra*, note 38 at 668.

[41] Harrell v. Wilson Cty. Schools, 293 S.E.2d 687 (N.C. Ct. App. 1982).

A New Jersey court ordered a school district to pay the residential tuition for a retarded eleven-year-old who had resided in that state since she was two months old.[42] The child lived with foster parents but her natural parents lived in New York. While courts generally assign responsibility for payment in such cases to the parents' district, and look with disfavor on foster parent arrangements for tuition purposes, in this instance the court concluded that EHCA required that the child not be "uprooted" and sent to New York.

The mainstreaming programs presented by school districts were rejected in two federal court cases. In both cases state appeal boards had rejected the district plans. In the first, a Massachusetts court rejected attempts by a school committee to reverse a state decision ordering a private residential day school program for a learning disabled student.[43] The court concluded that the preponderance of evidence supported the placement. In Rhode Island, a district judge concluded that the student-teacher ratio was too high in a "self-contained" classroom created for special eduction students and that a state decision requiring continued residential treatment following an administrative appeal under EHCA wa correct.[44]

A variety of state court cases also raised placement issues. The Supreme Court of Iowa concluded that state law did not require the best or maximum program, but instead, as with EHCA, required an "appropriate" program.[45] A California court ruled that a residential placement was appropriate, even though the state had claimed that the student's problems were related to his home environment.[46] In cases arising in New York, that state's commissioner of education was sustained in his ruling that a child was not handicapped[47] and rebuffed in a ruling requiring one school district to contract with another to provide services to a neurologically impaired child.[48] A New York court also ruled, consistent with decisions in previous years, that the termination of a program for the handicapped in one school and the transfer of students to a similar program elsewhere did not represent "a change in placement" under EHCA.[49] Finally, the Supreme Court of Hawaii resolved a conflict between the EHCA placement appeals process and state administrative processes by ruling that all such appeals must be by civil action following procedures contained in section 1415(e)(2) of EHCA.[50]

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[42] Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982).

[43] Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981).

[44] Colin K. v. Schmidt, 536 F. Supp. 1375 (D.R.I. 1982).

[45] Buchholtz v. Iowa Dep't of Pub. Instr., 315 N.W.2d 789 (Iowa 1982).

[46] San Francisco Unified School Dist. v. California, 182 Cal. Rptr. 525 (Cal. Ct. App. 1982).

[47] Schoenfeld v. Ambach, 451 N.Y.S.2d 859 (N.Y. App. Div. 1982).

[48] Board of Educ. of Greenburgh v. Ambach 453 N.Y.S.2d 895 (N.Y. App. Div. 1982).

4.1b Right to Education and Related Services

Right to education cases involving handicapped students fell into two distinct categories in 1982. The first to be discussed in this section involve class action suits claiming that states have failed to provide services to the handicapped, thereby violating EHCA or state statutory provisions. The second group of cases concern claims for additional or "related" services under EHCA. School systems are reluctant to provide medical assistance to handicapped students, or schooling beyond 180 days, while parents claim that EHCA requires such treatment.

A 1980 class action suit on behalf of handicapped children in New Mexico resulted in a district court injunction requiring the provision of services to the students.[51] The three-judge court concluded that section 504 of the 1973 Rehabilitation Act provided a private right of action to the parents, though the state had elected not to receive EHCA funds. New Mexico appealed the case to the Tenth Circuit Court of Appeals.[52] The state claimed that the section 504 claims were premature because the plaintiffs did not first exhaust their administrative remedies by filing claim with a state agency, nor did they wait for the Federal Office of Civil Rights to investigate the charges. The appeals court rejected these arguments. Focusing next on the substance of the section 504 arguments, the court turned to the Supreme Court's decision in *Southeastern Community College v. Davis*[53] for guidance. The appeals court concluded that *Southeastern* interpreted section 504 as prohibiting discrimination against the handicapped, rather than requiring affirmative action programs for them. The record from the district court was insufficient to determine whether such discrimination had occurred, however, and the case was remanded. The Tenth Circuit

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[49] Cohen v. Board of Educ., N.Y.C., 454 N.Y.S.2d 630 (N.Y. App. Div. 1982).

[50] *In re* Eric G., 649 P.2d 1140 (Hawaii 1982).

[51] New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980).

[52] New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

[53] 442 U.S. 397 (1979).

Court asked the district court to consider whether the New Mexico programs precluded the handicapped from enjoying benefits realized by the nonhandicapped, whether program modifications would result in the handicapped receiving such benefits, and whether such modifications would jeopardize the overall viability of the state's educational system. These major issues now await rehearing.

Litigation involving alleged inconsistencies between Nebraska statutory provisions for challenging the placement of handicapped children and the relevant EHCA placement provisions continued to travel between the Eighth Circuit Court of Appeals and the district court. The district court had settled one issue in 1980, concluding that the Nebraska commissioner of education did not have the power to review the placement decisions made by independent state hearing officers.[54] The Eighth Circuit let the lower court's injunction against the practice stand,[55] but remanded the bulk of the case. The case was subsequently dismissed without prejudice[56] because the Nebraska statute regarding the role of the hearing officer had been changed to conform to EHCA requirements. The plaintiffs appealed this decision but it was affirmed by the Eighth Circuit, which also concluded that the original placement controversy which initiated the litigation must first be the subject of an administrative appeal before it was ripe for adjudication.[57] The appeals court also reviewed *Rowley* and *Southeastern* before concluding that EHCA now required only "an adequate education, not necessarily the kind of education necessary to maximize each handicapped child's personal development."[58] Thus the lower court was correct in dismissing the bulk of the case, leaving only the question of attorney fees for one of the plaintiffs unresolved.

Two 1982 decisions addressed the treatment of handicapped children in state institutions. A 1978 consent decree was at issue in a Massachusetts case.[59] The agreement called for negotiations between organizations representing retarded citizens and agents for the state, whenever staff cuts were proposed at state institutions for the retarded. The district court was to referee the discussion. A proposed staff cut of 408 persons was reviewed by the court under this agreement and it was held that such a reduction would pose a threat to the care of the institutionalized clients. A limited number of specified reductions were permitted by the court, however. And in the State of Washington, a claim for the return of $83,000,000 collected by the state from institutionalized clients and their guardians for their care since 1967 was rejected, though some of the notices used to make the collections needed to be modified.[60]

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[54] Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980).

[55] Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1981).

[56] Rose v. Nebraska, 530 F. Supp. 295 (D. Neb. 1981).

[57] Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982).

[58] *Id.* at 1170.

[59] Ricci v. Okin, 537 F. Supp. 817 (D. Mass. 1982).

In 1980, a district court held that the State of New York's commissioner of education violated EHCA and the New York education law by issuing a rule defining handicapped children as those who exhibit a discrepancy of fifty percent or more between expected and actual achievement, and by taking away the power of local committees on the handicapped to assign students to residential treatment facilities at state expense.[61] The commissioner appealed the decision. The Second Circuit Court of Appeals reviewed the decision and declined to reach the merits of the claims, reversing instead because the parents bringing the original suit had failed to exhaust administrative remedies.[62] The appeals court noted that EHCA required only that "a severe discrepancy" exist between actual and potential performance, but that the record failed to show how the proposed fifty percent test would relate to the EHCA standard. This would be clearer, the court reasoned, if an actual appeal concerning a student placement were pursued. While finding the absolute ban on residential treatment to be a "much closer issue," the court noted that "the commissioner might reverse himself in a compelling case, if he were proved wrong."[63] Thus the case was dismissed without prejudice, inviting further litigation on both issues.

Injunctive relief sought on behalf of epileptic children in Kansas was denied by a district court.[64] The plaintiffs alleged that the policies of the Kansas commissioner of education and the Wichita school superintendent regarding the screening and programming for epileptic children violated the provisions of EHCA, section 504, and other state and federal requirements. Lengthy testimony was heard by the court on the nature of epilepsy and on the ways this condition might be addressed. While finding that the trial itself "was a learning experience for all involved, and will lead to further improvements," the court concluded that the plaintiffs failed to meet the burden of proof both for class certification and for injunctive relief.

Each year at least one catheterization case appears in this section. EHCA requires that handicapped students be provided with "related services" which make the receipt of a free and appropriate education possible. Following the holdings of a Fifth Circuit case,[65] the Third Circuit Court of Appeals ordered a school system to provide the catheterization of a Pennsylvania elementary school student.[66] Taken together, these ruling may settle this narrow issue.

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[60] Foundation for the Handicapped v. Department of Social and Health Servs., 648 P.2d 884 (Wash. 1982).

[61] Riley v. Ambach, 508 F. Supp. 1222 (E.D.N.Y. 1980).

[62] Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981).

[63] *Id.* at 642.

[64] Akers v. Boltan, 531 F. Supp. 300 (D. Kan. 1981).

An Ohio district court considered an array of requests from the parents of a severely handicapped student who functions at a "pre-academic level."[67] The court concluded that the school system did not have an obligation "to provide any and all services that might be beneficial" or "experiment with every new teaching technique that may be suggested."[68] Thus a variety of requested services, including a public education until the student reached age twenty-nine, were denied. The court did hold, however, that the student had the right to participate in after-school activities. A New York district court also addressed the question of additional services, concluding that a physically handicapped student did not have the right to participate in a school-sponsored trip to Spain under the requirements of section 504.[69]

4.1c Discipline

Cases involving the suspension or expulsion of handicapped children continue to be filed. A Fifth Circuit case decided in 1981[70] established the principle that an expulsion of a handicapped student represented a "change of placement" which could be undertaken only after an administrative review process considered the relationship between the misbehavior and the student's handicaps. The Sixth Circuit Court of Appeals considered a similar case in 1982 when it affirmed a lower court decision ordering an expelled handicapped student readmitted to school.[71] The student, a fifteen-year-old ninth grade student in an educable mentally handicapped program, had struck and kicked his teacher. He was subsequently expelled, with the school board arguing that his expulsion was not a change in placement and that the Kentucky expulsion statute applied with equal force to handicapped and nonhandicapped students. Failure to expel, they pleaded, would create a double standard for student conduct.

The appeals court disagreed with the board's arguments. Noting that no evaluation of the link between the assault and the student's handicap had been considered, the court concluded that EHCA required the diagnostic evaluation. This did not create a double standard, the court reasoned, because only the procedural safeguards for removing a handicapped child were different. The student could still be temporarily suspended, so long as the *Goss v. Lopez*[72] suspension procedures were followed. And permanent exclusion would be possible if the misbehavior was unrelated to the handicap. To allow traditional expulsion procedures in cases involving handicapped children would risk "eviscerating" the concept of individualized educational planning for handicapped children, the court reasoned.

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[65] Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980).
[66] Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981).
[67] Rettig v. Kent City School Dist., 539 F. Supp. 768 (N.D. Ohio 1981).
[68] *Id.* at 777.
[69] Wolff v. South Colonie Cent. School Dist., 534 F. Supp. 758 (N.D.N.Y. 1982).
[70] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).
[71] Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982).

A group of Maryland parents filed suit seeking to prevent the removal of their children from school because of behavior problems they alleged were related to their handicaps.[73] The parents argued that misbehaving handicapped children must be retained in their current placements while evaluation panels considered a change. The school systems, on the other hand, proposed that parents contest disciplinary removals in the EHCA administrative appeals process after the exclusion had occurred. The court decided that an administrative appeal represented "a quick and inexpensive determination" that a disciplinary action was or was not related to a student's handicap. Thus the court said it would not hear any case on the subject until the Maryland administrative process had been exhausted.

An Illinois case raised questions about a school suspension after an impartial hearing officer had concluded that a student's verbal abuse of his teacher was unrelated to his handicap.[74] The state superintendent, however, reversed the hearing officer's decision and the school board filed suit. In a tart decision, the district court overruled the state superintendent and reinstated the suspension, noting that the superintendent had engaged in "sophistry" by equating a short term suspension with a permanent expulsion. The court found the superintendent's concern for harm to the student "can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the degree of handicap, are free of classroom discipline."[75]

Another case from Illinois featured a claim by parents that their son should not have been suspended for carrying a knife in school because he should have been classified as handicapped.[76] Assorted fourth amendment and damage issues were also a part of the litigation. The student, who had received some thirty internal and external suspensions prior to the knife incident, was not determined to be handicapped until January, 1981, two months after his suspension. His parents argued, however, that the school system was two years late in classifying him as handicapped. The district court dismissed all the plaintiff's claims, holding that state court action on the knife seizure precluded several of them, and that EHCA and section 504 claims could not be reached. The court left standing the plaintiff's section 1983[77] claim against the Village of Bolingbrook, Illinois Police Department, while warning the plaintiffs that they now had a responsibility for proving that the village actually has a custom of making false arrests, as their suit alleged. This case has since been appealed to the Seventh Circuit Court of Appeals.

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[72] 419 U.S. 565 (1975).

[73] H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981).

[74] Board of Educ. of Peoria v. Illinois State Bd. of Educ., 531 F. Supp. 148 (C.D. Ill. 1982).

[75] *Id.* at 150.

[76] Reineman v. Valley View Commun. School Dist. No. 365-U, 527 F. Supp. 661 (N.D. Ill. 1981).

4.1d Attorney Fees and Damages

The large number of cases involving handicapped children decided in recent years have spawned additional suits focusing on the questions of attorney fees and damages. These cases were so numerous in 1982 that they now require discussion in a separate part of this section. Most of the attorney fee cases claim payment for counsel to prevailing parents under one or a combination of the following: Provisions of EHCA, section 504 and section 505 of the Rehabilitation Act of 1973, the Civil Rights Attorney's Fees Award Act[78] and various state statutes.

Much of the law in this area is unsettled, as demonstrated by the variety of holdings in the cases that follow. It has generally been agreed that EHCA does not provide grounds for either fees or damages. Some courts, however, have allowed parallel claims filed under sections 504 and 505 of the Rehabilitation Act. Other decisions have held that Congress would have placed a fee or damage section within EHCA, had it intended such remedies to be available. Courts are also mixed in their application of sections 1983 and 1988 of the Civil Rights Attorney's Fees Award Act. That Act allows claims when constitutional violations are alleged and has sometimes been applied when acts of Congress are challenged. Whether the issues raised by parties in handicapped litigation qualify under section 1983 is frequently argued in the cases that follow.

A 1981 Seventh Circuit Court of Appeals case[79] has helped to structure the cases in this area because its interpretation of the remedies in

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[77] 42 U.S.C.A. § 1983 (1976).
[78] 42 U.S.C.A. §§ 1983, 1988 (1976).
[79] Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

EHCA has come to be widely accepted. The Seventh Circuit concluded that EHCA could not be used as a base for making fee and damage claims since the Act did not contain a traditional damage remedy section. Instead, the "appropriate relief" which EHCA permits courts to grant was to be restricted to injunction regarding a child's program or placement. The Seventh Circuit left only two "exceptional circumstances" where damages might be awarded—where the child's health was risked or where the defendant acted in extreme bad faith by failing to comply with EHCA procedures.

Most damage and fee cases present complicated claims based on more than just EHCA. In one such case, the Supreme Court let stand an Eighth Circuit Court of Appeals decision remanding a damage claim, after requesting more arguments on the use of section 1983 as a remedy for violations of section 504 and EHCA.[80] While agreeing with the previous case in holding that EHCA itself does not provide a course of action for damages, the appeals court concluded that damages could be awarded under section 504. While the Eighth Circuit found that the eleventh amendment provided immunity to some of the named defendants, the bulk of the case was remanded for further arguments. The decision allowed further debate on the parents' claim for $524,000 filed against the St. Louis district.

A lower court decision awarding attorney fees on a proportional basis from state and local defendants was upheld by the Second Circuit Court of Appeals.[81] The complicated class action suit which culminated in the fee request had generated attorney fees in excess of $200,000 and had been settled in the plaintiff's favor. The State of New York, which ultimately was held responsible for twenty percent of the fees while New York City paid eighty percent had tried to argue that all state administrative remedies in addition to those under EHCA had to have been pursued before fees could be awarded. This argument was rejected, given the large number of handicapped students involved. The fee award was based on section 1983, with the court holding that the city and state had failed to meet statutory and constitutional obligations under both EHCA and section 504.

The Eighth Circuit Court of Appeals also awarded fees for a successful EHCA claim based on section 1983.[82] The defendants argued that EHCA contained no fee provision, a point with which the appeal court agreed. Nevertheless, the Eighth Circuit made the award after noting that the plaintiffs had also presented nonfrivolous claims under the fourteenth amendment and section 504. While these were not the basis for the lower court's decision, the appeals court reasoned that the outcome in the case would have been the same had these grounds been reached. Therefore the fee payment was ordered.

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[80] Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3013 (1982).

[81] Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).

[82] Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982).

The Fourth Circuit also confronted a fee case and approved a partial payment.[83] First, the court wrestled with the EHCA fee question and concluded, as have the other circuits, that EHCA did not provide a means for obtaining fees. Nevertheless, in the case at hand, the prevailing party had to go to court to obtain a student's return to the classroom pending a hearing. This, the Fourth Circuit concluded, was an attempt to preserve "rights, privileges, or immunities secure by the Constitution and laws," as provided for in 42 U.S.C. section 1983. Therefore section 1988 mandated fees for the court hearing only, and not for the legal assistance in the EHCA administrative hearings that followed. The appeals court also allowed fees for the preparation of arguments made on behalf of the fee payment. In another case, looking at a similar issue, a New York district court rejected the payment of fees to attorneys representing defendants solely in successful state administrative proceedings.[84]

Illinois plaintiffs who raised "substantial constitutional claims" as well as EHCA issues received $65,000 in attorney fees in a settlement.[85] The court concluded that constitutional claims made payment under section 1988 possible. The case presented other issues, since the successful attorneys were representatives of legal services organizations receiving public funding. While the state claimed that this represented grounds for denying the request, the court concluded that "well-settled" law led to the opposite conclusion and allowed attorney's fees. Attorneys were not granted fees for preparing their fee petitions, however.

A Rhode Island case also led to an award of fees under section 1988.[86] The district court allowed the award for representation during EHCA proceedings, reasoning that the plaintiffs had a "substantial" constitutional claim which could not be adjudicated until the EHCA proceedings had been terminated. The plaintiff's section 504 claim was rejected, however, and plaintiffs received no attorney's fees for making Rehabilitation Act arguments. The district court based this ruling on the fact that the parents were asking for a private school placement for their child which could not be granted under section 504, and that section 504 claims could be made only when all EHCA administrative proceedings had been concluded. An Illinois district court also denied an injunction request seeking damages and fees under a variety of acts until administrative appeals had been exhausted.[87]

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[83] Hymes v. Harnett Cty. Bd. of Educ., 664 F.2d 410 (4th Cir. 1981), *reh'g denied*, (1982).

[84] Noe v. Ambach, 542 F. Supp. 70 (S.D.N.Y. 1982).

[85] Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1982) (fee issue).

[86] Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982).

Section 1988 was used by a Hawaii district court to permit the payment of attorney fees related to an EHCA appeal.[88] In this instance, in a decision running counter to those just discussed, the court concluded that EHCA was a "comprehensive enforcement scheme" and therefore permitted payment of fees for an administrative appeal. The parents were considered to be a "prevailing party" after the state agreed to pay the tuition for a residential placement.

Several 1982 attorney fee cases hinged principally on Rehabilitation Act claims. The Fourth Circuit Court of Appeals affirmed an award of fees made by a district court based on the Rehabilitation Act.[89] The appeals court agreed that the settlement in the case made the parents the prevailing party, the point which the state had contested. A District of Columbia court, while finding case law in the area "inconclusive, at best," also awarded fees to parents based on section 505.[90] The court confronted the question of whether a section 505 claim can be made in a case where the principal arguments centered on EHCA. After a look at legislative histories, the district court concluded that section 505 was not explicitly limited to cases brought only under the Rehabilitation Act. Instead, section 505 was constructed to benefit handicapped children generally, and therefore could be used to claim attorney fees in EHCA proceedings.

In two related cases, a federal court ruled that a hearing officer cannot assign financial responsibility for tuition costs in cases brought under the Rehabilitation Act of 1973.[91] The same court also awarded attorney fees in the case,[92] noting that the parents had used a section 504 claim to compel the school district to hold a placement hearing, even though they did not prevail in their claims. The mere holding of the hearing was a right to which the parents were entitled and required the payment.

While fees have often been granted, the award of damages in handicapped cases is a comparative rarity. A Rhode Island case involving a tuition claim for a student with dyslexia was settled in favor of the state.[93] The district court found that the student had graduated, thus rendering all claims except those under EHCA moot. The Rhode Island court then drew heavily on the Seventh Circuit[94] to conclude that EHCA contained no damage remedy. As to the fourteenth amendment claim advanced by the parents, the court cited *Carey v. Piphus*[95] as authority for the position that proof of actual injury must be shown before an award for a constitutional violation could occur. The school committee's failure to hold a timely hearing, then, resulted in the assessment of one dollar in damages.

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[87] Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982).

[88] Department of Educ. v. Valenzuela, 524 F. Supp. 261 (D. Hawaii 1981).

[89] Pratt v. Board of Educ. of Frederick Cty., 674 F.2d 259 (4th Cir. 1982).

[90] Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982).

[91] Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209 (D.D.C. 1982).

[92] *Id.* at 1215.

[93] Jaworski v. Rhode Island Bd. of Regents for Educ., 530 F. Supp. 60 (D.R.I. 1981).

Parents of a Texas student claimed that their school district acted in bad faith and endangered the health of their child through an improper placement.[96] The disputed placement was changed by a hearing officer and the parents then filed a substantial claim for damages under EHCA, section 504 and the fourteenth amendment. The plaintiffs requested a summary judgment, which was denied. The court did accept the defendant's motion to dismiss EHCA and section 504 actions, concluding that neither offered a private damage remedy in this instance. The case was then remanded to determine if, in fact, the student was handicapped at the time the allegedly improper placement occurred.

An Illinois damage case was continued when all dismissal motions were denied.[97] The court found sufficient facts to advance a claim that "exceptional circumstances" warranted the student's parents decision unilaterally to place him at a private residential institution. Significant section 504 and EHCA claims remain for trial, but the court did dismiss a $525,000 general damage claim on the grounds that tort damages were foreclosed under EHCA.

A district court in Hawaii granted both tuition costs and fees in a case involving a four-year-old handicapped child.[98] The court distinguished between the tuition award it was making and other forms of damages, which would not be permitted, citing an Eighth Circuit case which made the same distinction.[99] Once concluding that tuition damages were appropriate and that the student's statutory rights had been violated, the district court used sections 1983 and 1988 to award attorney fees. The district court drew on a recent Supreme Court case in ordering fees paid for an administrative appeal.[100]

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94. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

95. 435 U.S. 247 (1978).

96. Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982).

97. William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982).

98. Department of Educ., State of Hawaii v. Katherine D., 531 F. Supp. 517 (D. Hawaii 1982).

99. Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd*, 645 F.2d 592 (8th Cir. 1981).

100. New York Gaslight Club v. Carey, 447 U.S. 54 (1980).

In an unusual case which allowed parents to receive $50,000 in damages from a jury, a New York district court held that first amendment claims arising from a handicapped placement were valid.[101] The court first concluded, following arguments similar to other cases in this section, that EHCA contained no provisions for obtaining damages and that section 1983 was inapplicable because EHCA had no damage section. The court also held that section 504 claims could not be made until all administrative appeals under EHCA were exhausted, citing a recent Rhode Island case as support for that approach.[102] The New York court did, however, let stand the plaintiff's first amendment claim that the school system had harassed them in retaliation for their filing of the lawsuit in the case. The court found the first amendment claim to be "valid" and let the jury make the award.

A Montana Supreme Court case considered the question of liability for an improper placement of a handicapped child under state statutes.[103] Without reaching the merits of the parents' claim, the court held that such claims could not be rejected on the ground of sovereign immunity, noting that the Montana Constitution abolished sovereign immunity except where the legislature enacts contrary legislation by a two-thirds vote. The divided court did, however, affirm dismissal of the parents' due process claims.

The Rhode Island Supreme Court considered a variety of claims filed by parents seeking damages because a psychiatric report had been released to persons not connected with the case in violation of a state act.[104] In remanding the case, the court concluded that the damage claims could be joined with the issues still pending. Finally, in a per curiam decision, a Florida appeals court concluded that no cause of action was stated when parents filed an educational malpractice suit alleging their child had been placed in an improper special education program.[105]

4.2 PUBLIC SCHOOL ASSIGNMENT, TUITION AND TRANSPORTATION

4.2a Tuition and Assignment

School districts facing declining tax support sometimes resort to fee charges as a means of raising revenues. In a case challenging one such fee, a California appeals court struck down a system which charged students from $25 to $44 for each extracurricular activity.[106] The fee was assessed for participation in after-school activities, such as sports, orchestra, drama and choral programs. Many of the activities were associated with high school classes in which graduation credits were given.

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[101] Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982).

[102] Turillo v. Tyson, 535 F. Supp. 577 (D.R.I. 1982).

[103] B. M. v. Montana, 649 P.2d 425 (Mont. 1982).

[104] Chase v. Mousseau, 448 A.2d 1221 (R.I. 1982).

[105] Tubell v. Dade Cty. Pub. Schools, 419 So. 2d 389 (Fla. Dist. Ct. App. 1982).

In deciding the case, the appeals court focused on a section of the California Administrative Code which prohibited fees "unless specifically authorized by law."[107] The court concluded that the code prohibited the charging of fees for extracurricular activities, adding that the activities in question were also linked to the "essence" of academic courses. Because the activities used school facilities and personnel, it was not possible to separate them from the regular program. Having decided the case on state grounds, the court declined to discuss the fourteenth amendment questions raised by the plaintiffs.

The Supreme Court of Nebraska considered a case in which the state board of education had ordered a school district to pay the tuition costs for several students to attend school in South Dakota.[108] The students resided near the state border and the South Dakota school was twenty miles closer than the one in Nebraska operated by the district which filed the appeal. The court dismissed the appeal when it determined that the case had been filed in the county where the state board had rendered its decision, rather than in the county where the disputed claim arose.

In a typical boundary dispute, a Massachusetts appeal court considered a case in which the school district line went through the living room of the plaintiff's home.[109] Testimony in the case revealed that two children slept in one town while a third slept in the other. The court split the issues it faced, concluding that the students were residents of the town in which the largest percentage of the house was located. However, it refused to award recovery of tuition costs for the education the students had received while attending the wrong school, since the attendance was based on good-faith assumptions about which school district the children should have attended.

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[106] Hartzell v. Connell, 186 Cal. Rptr. 852 (Cal. Ct. App. 1982).

[107] CAL. ADMIN. CODE tit. V, R. 350.

[108] Board of Educ. of Keya Paha Cty. v. State Bd. of Educ., 323 N.W.2d 89 (Neb. 1982). The Nebraska Court also interpreted that state's law on tuition payments in cases where property is transferred. *In re* Freeholder's Petition, 317 N.W.2d 91 (Neb. 1982).

[109] Teel v. Hamilton-Wenham Reg. School Dist., 433 N.E.2d 907 (Mass. App. Ct. 1982).

4.2b Transportation

Recent cases involving transportation have been created by school board decisions to reduce bus service as a response to shrinking school revenues. Several suits challenging such reductions were heard, including a Pennsylvania case decided in 1981[110] which was appealed to the Third Circuit Court of Appeals.[111] The district court had issued an injunction against the decision by the Albert Gallatin Area School District to provide only one-way transportation for kindergarten pupils. The students received half-day instruction and the district had decided not to provide noontime bus service to those students who were starting or finishing their programs at that time. The district court held that the arrangement created a "suspect classification" in violation of the fourteenth amendment.

The lower court's equal protection reasoning was rejected by the appeals court and the case was remanded for a consideration of state issues. The Third Circuit rejected the district court's use of the suspect class test to determine if a fourteenth amendment violation had occurred. The lower court had concluded that education was a fundamental right and that students from lower income families could not afford the new bus service, thereby creating a suspect class based on wealth. Citing *San Antonio v. Rodriguez*,[112] in which the Supreme Court had squarely rejected both contentions, the Third Circuit concluded that the less rigorous "rational basis" test for weighing fourteenth amendment claims should be used in the case. The court then concluded that the school board's decision, in the face of limited funds, was not irrational. The case has since been appealed to the United States Supreme Court.

Similar reasoning was used by a Michigan appeals court to reject a request for bus service filed by parents in the Cadillac Area Public Schools.[113] Following defeat of a proposed mill rate increase by district voters, the school board ordered a halt to bus transportation for students living in excess of one and a half miles from the school. The court cited *Rodriguez* as justification for concluding that the decision had a rational basis. Looking at state statutes, the court concluded that Michigan law made bus transportation permissive rather than mandatory.[114] The subsequent passage of a mill rate increase by district voters has since made the issue moot for the students involved. Students denied bus service in another Michigan district, however, also had their claims rejected when an appeals court held that bus service was not mandatory.[115]

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[110] Shaffer v. Board of School Dirs., 522 F. Supp. 1138 (W.D. Pa. 1981).

[111] Shaffer v. Board of School Dirs., 687 F.2d 718 (3d Cir. 1982).

[112] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[113] Sutton v. Cadillac Area Pub. Schools, 323 N.W.2d 582 (Mich. Ct. App. 1982).

[114] The New York Court of Appeals also concluded, in a separate case, that the commissioner of education in that state had not been arbitrary in ruling that a student could be denied bus transportation. Gudrum v. Ambach, 448 N.Y.S.2d 466 (N.Y. 1982).

The Kansas Supreme Court considered a case in which a school district had received a ruling from the Attorney General compelling them to provide bus transportation.[116] The district argued that state law permitted them the option of reimbursing parents at a reasonable rate per mile in lieu of providing bus transportation, and had cancelled bus service in a large area of the district. The Attorney General contended that reimbursement was possible under the statute only if a student resided at some distance from a bus route or if it was impractical to schedule a route to serve the student. The court concluded, however, that state law left school boards substantial latitude in cancelling routes and approved the payment plan.

A West Virginia Supreme Court of Appeals decision ordered the provision of bus service to students living on gravel roads in Logan County.[117] The school district had treated student absences caused by the impassable roads as "unexcused." The West Virginia court concluded that both the school district and the state department of highways had denied the students their equal protection rights by failing to provide alternate methods of transportation and by not maintaining the roads adequately. In another case, similar equal protection and state claims were rejected when a Florida student voluntarily elected to attend school outside of her attendance zone and was denied transportation by a school board.[118]

Two transportation decisions made by the Rhode Island Commissioner of Education and affirmed by the state board of regents were consolidated and heard by the Rhode Island Supreme Court.[119] The decisions considered whether the routes travelled by students were impractical or hazardous, thereby requiring bus service under state statute. The court concluded that the commissioner's decision ordering the transportation in one case was appropriate but remanded the other case for rehearing because the commissioner had rendered a decision before holding a public hearing on the matter.

In a case which attracted substantial national attention, the First Circuit Court of Appeals sustained a lower court decision allowing the

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[115] Lintz v. Board of Educ., Alpena Pub. Schools, 325 N.W.2d 803 (Mich. Ct. App. 1982).

[116] Kansas v. Board of Educ. of Barton Cty., 647 P.2d 329 (Kan. 1982).

[117] Potter v. Miller, 287 S.E.2d 163 (W. Va. 1982).

[118] School Bd. of Leon Cty. v. Ehrlich, 421 So. 2d 18 (Fla. Dist. Ct. App. 1982).

[119] Brown v. Elston, 445 A.2d 279 (R.I. 1982).

Nashua, New Hampshire board of education to suspend bus routes when pupils riding the buses became unruly.[120] Plaintiffs in the case claimed their children were treated unfairly because they were not among the small percentage of the students in the bus who were troublemakers. They claimed that the New Hampshire busing law violated the fourteenth amendment because it allowed hearings after a suspension but not beforehand. In rejecting this claim, the First Circuit concluded that the New Hampshire law guaranteeing bus transportation did not promise suspension-free service. The court applied a reasonableness test to the policy and concluded taht the safety issues involved were sufficient to justify the suspensions, adding that blanket punishment for the violations of a few is "fairly common in the world of school discipline."[121]

4.2c Compulsory Attendance

Compulsory attendance cases in 1982 raised questions concerning attempts by parents to educate their children at home, rather than sending them to a public or private school. Most states permit such arrangements, provided that parents meet certain statutory requirements. These requirements were challenged, with parents claiming that religious or other grounds exempted them from meeting "equivalent instruction" or certified teacher regulations. *Yoder v. Wisconsin*,[122] which held that requiring Amish children to remain in school past the eighth grade violated their free exercise of religion, was frequently cited by those seeking home instruction, but courts showed a reluctance to use the case as authority for ignoring compulsory attendance laws.

A variety of Christian fundamentalist groups raised these issues in a Maine case, claiming that the state's compulsory attendance laws violated the first, ninth and fourteenth amendments.[123] Thus the district court was forced to wade through an array of constitutional claims. At the heart of the case, the plaintiffs claimed that the state requirement on compulsory attendance was overbroad and that the requirement that students receive "equivalent instruction" was too vague. Maine law permits the commissioner of education to "prescribe the course of study" for students and to deny authorization of a course of study "for cause."[124] Cause, however, was not defined, and could conceivably collide with the plaintiffs' first amendment rights. Thus the court denied the defendant's request for a summary judgment on the vagueness claim and called for more hearings. The bulk of the issues, however, including the arguments concerning the law itself, the equivalent instruction requirement, and certain reporting requirements which allowed the commissioner to obtain information about programs, were decided in favor of the state. Summary judgment was granted, then, on these issues.

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[120] Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).

[121] *Id.* at 282.

[122] 406 U.S. 205 (1972).

[123] Bangor Baptist Church v. Maine, 549 F. Supp. 1208 (D. Me. 1982).

[124] 20 ME. REV. STAT. ANN. § 102.7 (1981).

A 1951 law giving local school superintendents the power to approve home teaching programs and to require "qualified" instructors was upheld by the West Virginia Supreme Court of Appeals.[125] The parents claimed the public schools taught religious "heresy," and they raised first amendment claims, citing *Yoder*, when they were prosecuted under truancy laws. The court rejected the plaintiff's first amendment claims, noting that *Yoder* addressed a well-organized religious community which permitted at least partial schooling. The West Virginia Supreme Court concluded by stating, "this Court holds that sincerely held religious convictions are never a defense to total noncompliance with the compulsory school attendance law."[126] To rule otherwise, the court noted, was "a potential challenge to basic literacy."

An Alabama court upheld a state law requiring home instructors to hold public teaching certificates.[127] The parents who filed the suit were members of the Society of St. Pius X and believed that it would be a mortal sin if their children's religious salvation were endangered by exposing them to a secular education. After assessing the parents' *Yoder* claims, the court concluded that, in contrast to the Wisconsin case, the Alabama defendants failed to show how a secular education endangered the religious values of the children involved.

Oregon law contains an exemption from compulsory attendance which permits children to be taught the courses in grades one through twelve by a parent or private teacher.[128] This arrangement must be approved by the school district's executive officer and the students involved must take examinations prepared by the Oregon State Board of Education. Parents challenged the exemption on the ground that it was unconstitutionally vague.[129] They also claimed that private school students were subjected to different standards than those taught at home. The appeals court found that the statutory exemptions "are not models of legislative clarity" but upheld their constitutionality. The court concluded that the parents knowingly failed to send their child to school when asked to do so by the superintendent, and added that the superintendent did not have the responsibility to notify the parents that his decision could be appealed to the local school board.

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[125] West Virginia v. Riddle, 285 S.E.2d 359 (W. Va. 1981).
[126] *Id.* at 365.
[127] Jernigan v. Alabama, 412 So. 2d 1242 (Ala. Ct. App. 1982).
[128] OR. REV. STAT. § 339.030(2)(6).
[129] Oregon v. Bowman, 653 P.2d 254 (Or. Ct. App. 1982).

Exemptions to the compulsory attendance statute were also at issue in a case heard by the Supreme Court of New Hampshire.[130] New Hampshire permits home instruction if it would provide the student with special benefits or if educational hardship would result from attendance.[131] The court concluded that these standards were permissive, not mandatory as the parents had claimed. Therefore the state board of education was not required to provide them with an exemption. The case was remanded, however, because the statute required that parents be provided with written recommendations on how the deficiencies of their home instruction might be remedied. This step had not been followed. The court went on to suggest the school board tell the parents that the deficiencies in their home program could not be remedied so long as the parents were the "instructors." In a similar case, a Wisconsin appeals court concluded that the definition of "private school" in that state's attendance statute was not unconstitutionally vague.[132] Therefore the parents' claim that their home was a private school was rejected. A Florida court addressed the same claim and reached an identical conclusion.[133]

Contrary to these cases, an appeals court did find in favor of parents seeking home instruction in one appeal.[134] A Missouri court concluded that the burden was on the state to prove that the home tutoring was not "equivalent." In an added twist, the court suggested that the parents could invoke a self-incrimination defense and refuse to answer questions about their home program. Thus it appears that any home instruction would be permitted under this ruling. An Alabama court, however, reached the opposite conclusion, finding that the state's compulsory attendance law did not impermissibly shift the burden of proof from the state to the defendants.[135]

Only one immunization case was recorded in 1982. The Maryland Court of Appeals held that the state immunization statute violated the establishment clause of the first amendment, but that the invalid portion could be severed from the rest of the statute, thus leaving it in force.[136] The challenged statute granted exemption from the requirement to members of a "recognized church or religious denomination." The plaintiff rested his objection to immunization on personal religious views. While noting that courts in other states had viewed similar cases differently, the Maryland Supreme Court concluded that personal religious values were entitled to equal respect. The Maryland statute, however, gave an exemption only to members of specific organized churches, a provision which the court found to be an establishment of a state sanctioned religion. The court added, on the other hand, that the religious exemption portion of the statute could be severed from the rest, and held that there could be no religious exemptions at all. Therefore the plaintiff's conviction was upheld.

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[130] *In re* Pierce, 451 A.2d 363 (N.H. 1982).

[131] N.H. REV. STAT. ANN. § 193:3 (1980).

[132] Wisconsin v. White, 325 N.W.2d 76 (Wis. Ct. App. 1982).

[133] Florida v. M.M., 407 So. 2d 987 (Fla. Dist. Ct. App. 1982).

[134] *In re* Monnig, 638 S.W.2d 782 (Mo. Ct. App. 1982).

[135] Hill v. Alabama, 410 So. 2d 431 (Ala. Ct. App. 1982).

[136] Davis v. Maryland, 451 A.2d 107 (Md. 1982).

The Washington Supreme Court considered whether juveniles incarcerated in county detention facilities should be subjected to the state's compulsory attendance law.[137] Also at issue was the question of whether the county where such facilities were located had a responsibility to pay for the service. The seven-year-long litigation was settled quickly by the court, which concluded that the state's attendance law required the education of juveniles both before and after their adjudication. The counties were also required to pay for the education, though the court left open the question of whether a claim might be made against the state under a portion of state law allowing counties to reclaim the costs of "special supervision programs."

4.3 BILINGUAL-BICULTURAL PROGRAMS

In a 1982 case attracting wide notice, the United States Supreme Court decided by a 5-4 vote that the State of Texas had an obligation to provide a tuition-free education to thousands of "undocumented" children whose parents had illegally entered the state.[138] The Court majority affirmed a district court decision which held that illegal aliens could claim the benefit of the equal protection clause and that Texas had no rational basis for a statute which denied state funds to local district providing an education to the children.[139] In a sharp dissent, four justices concluded that the fiscal impact of the policy was a sufficient basis for the statute, absent a federal policy on the education of illegal aliens.

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[137] Tommy P. v. Board of Cty. Comm'rs, 645 P.2d 697 (Wash. 1982).

[138] Plyler v. Doe, 102 S. Ct. 2382 (1982).

[139] Certain Named and Unnamed Undocumented Alien Children v. Texas, 458 F. Supp. 569 (E.D. Tex. 1979), *aff'd on appeal* to Fifth Circuit; Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 451 U.S. 968 (1981).

The state appellants raised a number of arguments in favor of their policy, arguing that its reversal would reward unlawful conduct and encourage others to enter the state illegally. Had Congress wished to grant formal status to the children, the appellants argued, then it would have modified federal immigration laws accordingly. Without such legislation, they concluded the state was free to establish the tuition policy. The state raised three central arguments as to why the policy was in its interest: (1) The educational services would encourage immigration and drain the state's fiscal resources, (2) the policy would improve the overall quality of education, and (3) the migrant children would be less likely than legal residents to stay in Texas after graduation.

Justice William Brennan, writing for the majority, rejected each of these claims, first noting that the policy was directed not at the adults who had illegally entered the United States, but at their children.[140] While affirming the Court's previous decision that education was not a fundamental right,[141] the majority nevertheless concluded that the policy was "an affront to one of the goals of the Equal Protection Clause: The abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[142] The Court rejected the fiscal argument by noting that the aliens were "a cheap source of labor" who contributed more to the economy than they claimed in services. Turning to the educational arguments, the majority could find no support for the claim that the migrant children affected the overall quality of education in Texas and no justification for selecting this particular group to exclude if such evidence were forthcoming. Finally, Justice Brennan found no evidence that the children were less likely to stay in the state upon graduation and that the creation of a "subclass of illiterates" would be more costly to the state than any short term fiscal gain.

Chief Justice Warren Burger wrote for the dissenting justices, observing that it was not the Court's role to set "the Nation's social policy" and that the majority opinion abused the fourteenth amendment "in an effort to become an omnipotent and omniscient problem solver."[143] Focusing on the heart of the case, the Chief Justice concluded that Texas had a legitimate reason for distinguishing between students who were lawfully residing in the state and those who were not. Noting that the federal government excluded illegal aliens from many of its own programs, the minority concluded that the state had a rational basis for the policy, even though, the Chief Justice wrote: "Denying a free education to illegal alien children is not a choice I would make if I were a legislator."[144] The issue, the minority argued, was one which should be left to the political process.

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[140] Plyler, *supra*, note 138 at 2396.
[141] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).
[142] Plyer, *supra*, note 138 at 2397.
[143] *Id.* at 2408.

Another Texas case addressed major issues surrounding bilingual programs. In a 1981 decision, a federal district judge ordered a massive statewide bilingual education program for Hispanic children residing in the state.[145] In this sweeping decree the court characterized the state's program in this area as "wholly inadequate" and ordered specific bilingual programs, testing and various monitoring activities. Texas subsequently filed procedural objections to the decision, arguing that it had not consented to the evidentiary stipulations made by its own counsel and that it had not been permitted to fully address the constitutional issues in the case.[146] The district court denied these motions and the case moved on to the Fifth Circuit Court of Appeals.[147]

On appeal, the Fifth Circuit Court found little of merit in the district court's decision, characterizing it as "severely flawed" and filled with "procedural oddities." The state defendants had originally moved for a three-judge court to hear the constitutional challenges to their bilingual programs, at which point the plaintiffs agreed to delete all constitutional claims. Later, however, the court permitted the constitutional issues to be raised when the "defendant's proposed opinion" was submitted which contained admissions of past state constitutional violations. The appeals court viewed this turn of events as follows: "Having survived all these hazards and preserved the case free of constitutional questions, defendants steamed into harbor and tied up, only to sink at the slip."[148] The blame for this unusual turn of events was assigned by the appeals court to the state's counsel, who had entered stipulations damaging to the state's case "without authority from her client and, in fact, in general disregard of its instructions to her."[149] The stipulations admitted both past discrimination and constitutional violations. At this point, the attorney assigned to the case by the state was removed from the list of attorneys licensed to practice law in Texas, for reasons unrelated to the litigation. The appeals court, then, was left with an unusual set of procedural circumstances and a case in which the state had conceded many of the major points in contention.

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[144] *Id.* at 2413.
[145] United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981).
[146] United States v. Texas, 523 F. Supp. 703 (E.D. Tex. 1982).
[147] United States v. Texas, 680 F.2d 356 (5th Cir. 1982).
[148] *Id.* at 361.
[149] *Id.* at 368.

In reversing, the appeals court found that the controversial stipulations lacked the factual support to sustain a claim of historical segregation or discrimination. The court also concluded that the district court should have considered Texas bilingual programs in light of a 1981 state act which addressed many of the concerns presented in the original litigation. Finally, the court required that the individual school districts whose programs were affected by the decision be given an opportunity to be heard. The court suggested that litigation be filed in several Texas district courts, rather than one, should the case be pursued.

4.4 PRIVATE AND PAROCHIAL SCHOOLS

Courts continued to rule on the permissibility of various types of state involvement with nonpublic schools in 1982. The question of transportation for private school children was before the supreme courts of three different states. In another case, a private school unsuccessfully challenged a school board's refusal to sell it surplus buildings. Maryland students failed in their attempt to be admitted to a county music program offered only to public school students. In Ohio, however, a statute providing a wide assortment of shared materials and services to private schools was upheld. Several different courts also ruled that state regulation of schools did not violate the constitutional rights of private schools.

Three state high court decisions addressed questions concerning the transportation of private school pupils. The Ohio Supreme Court held that a local school district could not end payments in lieu of transportation made to parents of private school students without conforming to all portions of the relevant state statute.[150] The local board had neglected to secure confirmation from the state board of education that the transportation was unnecessary or unreasonable, as required by the Ohio Revised Code.[151]

In Massachusetts, the supreme judicial court ruled that state law required the transportation of private school students only up to the distance of the public school which the student would otherwise attend, if the distance exceeds two miles.[152] The 1950 statute entitling private school students to transportation was upheld, but the court's interpretation of the equal distance requirement may create problems in districts where the private school is farther away than the public school. Essex, Massachusetts, where the case originated, did not operate a high school and all pupils were bused to a nearby town. Transportation was refused to private school students, however, in spite of the state law requiring districts to provide the service to students living more than two miles from school.

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[150] Hartley v. Berlin-Milan Local School Dist., 433 N.E.2d 171 (Ohio 1982).

[151] Ohio Rev. Code Ann. § 3301.07(D).

[152] Attorney General v. School Comm. of Essex, 439 N.E.2d 770 (Mass. 1982).

In setting the new limit on private school busing, the Massachusetts court concluded that the words "to the same extent" in the state statute did not mean that the student must be bused on demand to any school. Rather, the distance to the nearest public school is an appropriate way of measuring "the same extent," the court reasoned. Further litigation on this issue can be anticipated.

The Nebraska Supreme Court upheld a state statute[153] that requires a school district providing transportation for school children to public schools also to provide transportation for children attending approved nonprofit private schools.[154] The court held that the statute did not violate the portions of the state constitution prohibiting appropriations to nonpublic schools and prohibiting the granting of special or exclusive privileges. The Nebraska court also ruled that the statute could not be challenged on equal protection grounds by the school district because it was not a member of the class that claimed to be discriminated against.

With regard to the establishment clause of the first amendment, the Nebraska court cited a United States Supreme Court case which found that a school district had not violated the first amendment when it reimbursed the parents of school children attending a nonprofit private school for money spent on bus transportation.[155] The court also held that the statute passed the three-pronged test established in *Lemon v. Kurtzman.*[156] The court concluded that the statute had the secular purpose of providing safe transportation for children attending private schools, did not inhibit or advance religion, and did not create an excessive entanglement between the state and religion.

In Delaware, a United States district court held that the Wilmington school board could refuse to sell surplus school buildings to private schools.[157] The board rejected the offer because the sale might contribute to "white flight." The private school claimed that the refusal violated its fourteenth amendment due process and equal protection rights as well as the first and ninth amendments. The district court rejected these claims, holding that the refusal did not violate the

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[153] NEB. REV. STAT. § 79-487 (Reissue 1976).

[154] Nebraska v. School Dist. of City of Lincoln, 320 N.W.2d 472 (Neb. 1982).

[155] Everson v. Board of Educ., 330 U.S. 1 (1947).

[156] 403 U.S. 602 (1971).

[157] Wilmington Christian School v. Board of Educ. of Red Clay Consol. School Dist., 545 F. Supp. 440 (D. Del. 1982).

Constitution because it furthered the legitimate government interest of implementing desegregation. The court agreed with the school board's contention that providing the private school with increased enrollment capacity could drain additional white students from the public school system, hampering court-ordered desegregation. The court used the rational relation standard because the refusal did not interfere with the operation of the private school nor did it deny the students' parents the right to direct their children's religious upbringing. The court held that private schools' exercise of a fundamental right was merely made more expensive. The court noted that the state was under no obligation to encourage or support private education and although it could not require public school attendance instead of private, it could encourage students to attend public schools.

A United States district court upheld an Ohio statute providing aid to elementary and secondary nonpublic school children.[158] The aid involved the provision of independent and fully severable materials and services available to students attending public schools. The court held that although the establishment clause prohibits government support or involvement with religious activity, the Supreme Court has not held that all aid to private schools is prohibited. The court examined each form of aid using the tripartite test in *Lemon v. Kurtzman*. The court noted that the provision of secular textbooks, approved for use in public schools, has been upheld in two other cases by the United States Supreme Court.[159] The court also held that the provision of maps, charts and models incapable of diversion for religious use did not differ from the textbook programs found constitutional. The court upheld certain medical, psychological, nursing, dental and optometric services, observing that the Supreme Court has repeatedly upheld the provision of public health and welfare benefits to young citizens whether they attend private or public schools. Remedial and therapeutic services for nonpublic school children provided in public centers and mobile units were also approved. The court again ruled that the programs, whose primary beneficiaries are the children in need of the services, were not likely to foster excessive entanglement between the private schools and the government. The court upheld standardized testing services and field trip transportation as well, citing Supreme Court approval of these secular activities. The court concluded that the entire statute provided nonpublic and public school children limited, secular services and materials against which it found no constitutional objections.

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[158] Wolman v. Essex, 544 F. Supp. 491 (S.D. Ohio 1982).

[159] Board of Educ. v. Allen, 392 U.S. 236 (1968); Meek v. Pittenger, 421 U.S. 349 (1975).

Students in Maryland sought admission to an all-county music program offered to full-time public school students. The private school children contended that they were entitled to attend any program or instructional class offered to public school students. The Maryland state appeals court rejected this, holding that the school board did not have to extend all programs offered to public school students to those attending parochial schools as well.[160] The court ruled that this did not interfere with the students' free exercise of religion. The court also rejected equal protection claims and allegations that the policy burdened their right to freedom of educational choice. The court refused to open what it deemed a "Pandora's box" which would allow a private school, if it wished, to transport its entire student population to a nearby public school for a particular class. The court concluded that the legislature or school board could permit private school children to attend selected programs or classes, but that it would not mandate such a burden on the administration of the public school system.

The Supreme Court of Nebraska held that a private school does not have a first or ninth amendment right to disregard state laws regulating schools.[161] The supreme court had found previously, in a case regarding the same school, that the state's right to regulate schools was reasonable and did not place an unreasonable burden on the defendants' religious beliefs.[162] The court held that although parents had the right to send their children to private schools, they did not have the right to ignore reasonable government regulations as to the quality of education furnished. State supreme courts in Hawaii[163] and Massachusetts[164] also held that state regulations concerning the operation of schools did not unconstitutionally infringe on the rights of private schools.

4.5 SCHOOL SPORTS

4.5a State Athletic and Activity Associations

State athletic associations continued to have their rules and regulations upheld in 1982 as courts generally concluded that the rules had a rational relationship to legitimate state interests. Students unsuccessfully challenged antitransfer rules, age restrictions, residency requirements, and a rule prohibiting Orthodox Jews from wearing yarmulkes while playing basketball. In one case, a court also held that a referee's decision should not be the subject of litigation. Another decision did find, however, that an athletic association violated a student's procedural due process right when it withheld a semester of athletic eligibility without offering any basis for the decision.

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[160] Thomas v. Allegany Cty. Bd. of Educ., 443 A.2d 622 (Md. 1982).

[161] Sileven v. Tesch, 326 N.W.2d 850 (Neb. 1982).

[162] Nebraska v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), *cert. denied*, Faith Baptist Church v. Douglas, 454 U.S. 803 (1981).

[163] Hawaii v. Andrews, 651 P.2d 472 (Hawaii 1982).

[164] Attorney General v. Bailey, 436 N.E.2d 139 (Mass. 1982).

A federal district court in Illinois saw its decision allowing Orthodox Jews to wear yarmulkes while playing basketball overturned by the Seventh Circuit Court of Appeals.[165] Members of the Orthodox Jewish faith are required to keep their heads covered at all times unless they are unconscious, immersed in water, or in imminent danger of loss of life. The Illinois High School Association (IHSA) has a rule prohibiting the wearing of casts, bobby pins, jewelry or headgear while playing basketball. Students at a private secondary school adhering to the Orthodox faith challenged this rule. The district court had held that the IHSA rule constituted state action for constitutional purposes and that the group would have to show a compelling state interest to outweigh the students' first amendment religious rights.[166] The court concluded that although yarmulkes do fall to the floor once or twice a game, so do eyeglasses worn by the participants, part of pompoms, and other debris against which there are no prohibitions. The court held, therefore, that the prohibition against yarmulkes did not serve a compelling state interest and that the underlying safety concerns were too slight to outweigh the students' first amendment rights.

The Seventh Circuit Court of Appeals reversed, ruling that the precise method of covering the head is not specified by Jewish law, and that the wearing of the yarmulke, which is likely to fall off during a basketball game, was by convention rather than religious obligation. The court found the safety concerns of the state "while not great, were not wholly trivial"[167] and interpreted the IHSA's rule as only prohibiting insecurely mounted yarmulkes. The court put on the plaintiffs the burden of devising an alternate method of covering the head which satisfied the safety concerns of the IHSA. The students then petitioned for a rehearing, but it was denied by the court.

In a Missouri case, the transfer rule of the state high school athletic association was upheld in the Eighth Circuit Court of Appeals.[168] The court consolidated a number of actions including a case reported last year[169] and an appeal of a district court ruling which found that the transfer rule violated the equal protection clause of the fourteenth amendment of the Constitution.[170] The rule, one common to most states, prohibits transfer students from participating in interscholastic athletics during the first year after their transfer. The district court held that the rule was capricious and overinclusive because it involved students who transferred schools for legitimate purposes. The appeals court disagreed, holding that "the rule need only be rationally related to a legitimate state purpose,"[171] concluding that the prevention of transfers motivated by athletics was legitimate and that the wisdom or unfairness of the rule was a policy decision for legislators and administrators. The appeals court also rejected due process claims and said that for private schools the transfer rule was still a "reasonable and neutral regulation."[172]

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[165] Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982).

[166] Menora v. Illinois High School Ass'n, 527 F. Supp. 637 (N.D. Ill. 1981).

[167] Menora, *supra*, note 165 at 1035.

[168] *In re* United States *ex rel*. Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982).

Two cases involving the New Hampshire Interscholastic Athletic Association (NHIAA) were heard last year. In the first, the NHIAA appealed an order allowing a student to run in a track meet called the "Meet of Champions."[173] The student claimed that he had been fouled during a qualifying meet, causing him to finish seventh and miss the cutoff for the "Meet of Champions." Although he protested the foul after the race, there was no referee located near the alleged infraction for verification. The meet director wrote a letter to the NHIAA requesting that the student be allowed to run in the "Meet the Champions" because of the controversy over the foul. The NHIAA refused to allow him to participate, and a trial court subsequently ordered them to allow him to run. The state supreme court, on the day of the race, held that every referee's decision could not be subjected to judicial scrutiny. Finding no irregularities with the NHIAA's procedures, the court vacated the lower court order.

The second New Hampshire case involved a student who withdrew from his sophomore year of high school because of illness and was subsequently granted only one extra semester of athletic eligibility by the NHIAA.[174] The student had gone through the proper appeals process but received neither an appeals hearing nor a reason why he wasn't granted a full year of eligibility. The NHIAA merely stated its denial of a full year of eligibility in the minutes of its executive council. The state supreme court held that the right to participate in interscholastic athletics was protected by the procedural due process clause of the state constitution. Due process was required to assure that the facts were relied upon in making the eligibility determination and that the decision was reasonable. The court concluded that the NHIAA "found no facts and gave no reasons for its decision denying the plaintiff eligibility"[175] and thereby violated his procedural due process right.

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[169] Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 499 (W.D. Mo. 1980).

[170] ABC League v. Missouri State High School Activities As'n, 530 F. Supp. 1033 (E.D. Mo. 1981).

[171] *In re* United States *ex rel.* Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982) at 152.

[172] *Id.* at 153.

[173] Snow v. New Hampshire Interscholastic Athletic Ass'n, Inc., 449 A.2d 1223 (N.H. 1982).

[174] Duffley v. New Hampshire Interscholastic Athletic Ass'n, Inc., 446 A.2d 462 (N.H. 1982).

The Supreme Court of Oklahoma held that an athletic association rule prohibiting nineteen-year-old students from participating in interscholastic high school athletics was reasonable, fair, and related to the purpose it was intended to serve.[176] The court overturned a district court ruling allowing the student to compete in interscholastic track events. The court found no evidence of fraud, or collusion, or that the association had acted in a capricious, unreasonable, or arbitrary manner.

A high school student challenged the Ohio High School Athletic Association rule prohibiting nonstate residents from participating in interscholastic athletics. A state appeals court held that a trial court had been correct in applying the rational basis test in evaluating the alleged equal protection violation.[177] The court ruled that high school athletes were definitely not a suspect class entitled to strict scrutiny. The court concluded that participation in athletics was not a separate property interest entitled to due process and that there was nothing arbitrary or collusive about the rule.

A Florida court held that a high school activities association rule limiting the number of team members permitted to participate in postseason football play violated the equal protection clause of the Constitution.[178] During the regular season, teams were permitted to suit up an unlimited number of players, but during the playoffs teams were allowed only forty-four. The court held that the rule created two classes of football players: those who practice every day and are allowed to play in all games and those who practice every day and are allowed to play only in regular season games. The court said the rule was "shocking and reprehensible"[179] and ordered that all students on the roster of the football team be allowed to participate in playoff competition.

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[175] *Id.* at 468.

[176] Mahan v. Agee, 652 P.2d 765 (Okla. 1982).

[177] Menke v. Ohio High School Athletic Ass'n, 441 N.E.2d 620 (Ohio Ct. App. 1981).

[178] Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982).

[179] *Id.* at 248.

The University Interscholastic League of Texas appealed a ruling enjoining them from enforcing an eligibility rule in which schools were ordered to forfeit all games in which ineligible players had participated.[180] A state appeals court held that the league was not a governmental agency and would therefore have to post a bond in order to appeal. In another Texas case, a different appeals court also ruled that an athletic association would have to provide security in order to appeal a ruling which enjoined them from enforcing their summer camp rule.[181]

4.5b Sex Discrimination

Only two cases involved allegations of sex discrimination in 1982. In one, a federal district court held that female students did not have the right to participate on a boys' basketball team under either the equal protection clause or Title IX. In the second, a state supreme court found that separate seasons for boys and girls in the same sport were permissible.

In a case that was reviewed by Supreme Court Justice Paul Stevens,[182] a district court ruled on the motion for a summary judgment made by a school board which refused to allow an eleven-year-old girl to try out for the boys' basketball team.[183] The female student is an exceptional basketball player and wished to play on the boys' team in order to find competition sufficient to develop her skills. The district court originally had issued a preliminary injunction allowing her to try out for the boys' team, but an appeals court reversed and Justice Stevens refused to intercede.

The district court subsequently found that the student had not been denied equal protection. The district court concluded that gender-based discrimination must be substantially related to an important government objective in order to be constitutional. The court then found that separate teams were needed for boys and girls in order to maximize participation of both sexes and to prevent boys from dominating the girls' program which would deny them an equal opportunity to compete in sports. The court noted that although the policy was arbitrary with regard to this particular student, it was reasonable in substantially all of its applications and therefore was not an unconstitutional generalization. On the student's claim that her exclusion

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180. University Interscholastic League v. Payne, 635 S.W.2d 754 (Tex. Civ. App. 1982).

181. Marshall v. Brown, 635 S.W.2d 578 (Tex. Civ. App. 1982).

182. O'Connor v. Board of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981).

183. O'Connor v. Board of Educ. of School Dist. No. 23, 545 F. Supp. 376 (N.D. Ill. 1982).

from the boys' team violated Title IX, the court held that the federal regulation merely required that when selecting which teams and sports to offer, the interests and abilites of both sexes are to be taken into account so that each sex has an equal opportunity to participate. The court concluded that this was not intended to require that girls be allowed to participate on boys' teams. The motion for a summary judgment was granted and the plaintiff's action was dismissed.

The Supreme Court of Minnesota held that separate seasons for boys' and girls' athletic teams in the same sport did not deny them equal protection of the law.[184] The seasons were substantially equal in terms of length, rules, coaching and money spent. They had been separated because limited facilities were available. The court also held that the costs of the transcript used to prepare a post-trial brief by the prevailing party could not be charged to the losing party and that the costs of the transcript used in making a motion for a new trial could not be taxed to the other party.

4.6 SUBSTANTIVE RIGHTS OF STUDENTS

4.6a Search and Seizure

Courts continued to grapple with fourth amendment issues in a number of 1982 cases. Because the fourth amendment prohibition against unreasonable search and seizure applies only to official actions by government agents, cases in this area often hinge on the role of school personnel in conducting searches and on the subsequent use of evidence seized. Searches conducted by police officrs have traditionally been subjected to a "probable cause" standard and any failure to obtain a search warrant must be justified. School officials generally must meet the less rigorous standard of "reasonable suspicion," particularly if the evidence is subsequently used only in school disciplinary action as distinct from criminal prosecution. These issues were debated in several 1982 cases, as was the increased use of sniff dogs to recover contraband in the public schools. The use of sniff dogs has been the subject of varying rulings in different courts and was litigated again last year in a federal court of appeals.

In response to a growing drug and alcohol problem, the Goose Creek Independent School District in Texas hired a service providing dogs trained to recognize sixty different illicit substances. The dogs were taken to schools within the district on a random basis where they sniffed students, lockers and cars. Students and lockers subsequently were searched if the dog indicated that it recognized an illicit substance. In the case of a car, the owner was asked to open its doors and trunk. Plaintiffs challenged the searches on the basis that they violated their fourth and fourteenth amendment rights. A district court found in favor of the school district and this was appealed to the Fifth Circuit Court of Appeals.[185] The appeals court struck down the use of dogs to sniff students but upheld their use for sniffing cars and lockers. The school district then petitioned for a rehearing. The court granted this and withdrew its first opinion.[186] In their second opinion, the Fifth Circuit reviewed the conflicting case law on the subject. The Tenth Circuit has upheld the use of dogs to sniff lockers in a case focusing on the fourteenth amendment,[187] and the Seventh Circuit has upheld the use of dogs to sniff students, relying on the doctrine of in loco parentis.[188] On the other hand, a district court in the Fifth Circuit last year rejected the use of dogs to sniff students or automobiles.[189]

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[184] Striebel v. Minnesota State High School League, 321 N.W. 400 (Minn. 1982).

The Fifth Circuit Court of Appeals ruling held that student lockers and cars wre in public areas and thus subject to an expectation of much less privacy, analogous to luggage checked at an airport.[190] Using *United States v. Goldstein*,[191] the court ruled that the sniffing of unattended lockers and cars in a public area did not constitute a search, and therefore the fourth amendment did not apply. Turning to the question of the sniffing of students, the court said that the search of a student was an entirely different question, concluding, "The students' persons certainly are not the subject of lowered expectations of privacy."[192] The court held that the degree of personal intrusiveness involved in the canine sniffing of a student made it a search, subject to the restrictions of the fourth amendment. The court felt that searches involving classrooms where there was no individualized suspicion were not reasonable and could not be justified by the need to prevent drug and alcohol abuse. The use of dogs to sniff student without reasonable individual suspicion was declared unconstitutional. The court also ruled that the presence of the dogs on campus did not violate the students' fourteenth amendment due process rights and that the case should be certified as a class action suit. On the question of the reliability of the dogs, the court said there was not enough information in the record for a determination and remanded the question to the district court approving the use of the standard that the dogs merely had to be shown to be reasonably reliable.

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[185] Horton v. Goose Creek Indep. School Dist., 667 F.2d 471 (5th Cir. 1982).

[186] Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982).

[187] Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

[188] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), 631 F.2d 91 (7th Cir. 1980), *cert. denied*. 451 U.S. 1022.

[189] Jones v. Latexo Indep. Scho[illegible]., 499 F. Supp. 223 (E.D. Tex. 1980).

[190] Horton, *supra*, note 186.

[191] 452 U.S. 962 (1981).

[192] Horton, *supra*, note 186.

An Alaska appeals court upheld the search of a high school student who had stolen money out of a locker room during a gym class.[193] The court rejected the use of in loco parentis, reasoning that search was not by private parties but "under the color of law"[194] because school officials had acted under school board policies and has used their status as public school officials in claiming the right to search the student. Although this meant there was sufficient state action to warrant application of the fourth and fourteenth amendments, the court held that school officials were not actual police officers whose regular duty is law enforcement and thus were subject to less stringent constitutional limitations.

A state appeals court in California upheld a search made by a school security agent on school grounds.[195] The court ruled that the security agent was "properly acting within the scope of his employment"[196] when he conducted a pat-down search of a student with unusually large bulges in his pockets. Cases which would classify the security agent as a police officer, bringing him under the constraints of the fourth and fourteenth amendments, were ruled inapplicable.

In Kentucky, a girl was suspended for failing to allow school officials to search her purse for firecrackers. Small, legal firecrackers had caused disruptions, and the student had been implicated as the source of the firecrackers. The district court ruled that reasonableness was the criterion to use under the circumstances.[197] The judge held that there is a need for discipline in schools and that teachers should not have to seek a warrant for every petty disciplinary action. Although not accepting the doctrine of in loco parentis as justification for every search, the court found there had not been a clear violation of the federal Constitution.

In Michigan, a federal district court ruled that a two-way mirror in a bathroom did not violate a student's fourth amendment right to privacy.[198] A tenth grade student was observed through the mirror buying marijuana from another student. He subsequently was taken to the principal's office, suspended and reported to the police. The court held that students enjoy a lower expectation of fourth amendment rights in schools and noted other cases in which searches of students have been upheld. The court quoted a Tenth Circuit Court of Appeals case which held that a student's fourth amendment rights must yield if they interfere with a school's duty to educate and maintain discipline.[199] The court also observed that the surveillance was done by school officials and not police officials and that only school disciplinary action resulted.

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[193] D.R.C. v. Alaska, 646 P.2d 252 (Alas. Ct. App. 1982).

[194] *Id.* at 155.

[195] *In re* Guillermo M., 181 Cal. Rptr. 856 (Cal. Ct. App. 1982).

[196] *Id.* at 857.

[197] Bahr v. Jenkins, 539 F. Supp. 483 (E.D. Ky. 1982).

[198] Stern v. New Haven Commun. Schools, 529 F. Supp. 31 (E.D. Mich. 1981).

A New York court ruled that school officials have broad powers to maintain discipline and provide security in public schools.[200] A principal was found to be upholding his in loco parentis responsibilities when he detained five youths who were not students of the school and who were suspected of harassing its students. In another case, a Florida appeals court ruled that a student who merely looked suspicious could be detained in the principal's office for the purpose of a search.[201]

4.6b First Amendment Religious Rights

Courts continue to consider attempts by school boards or legislatures to establish "moments of silence" or other substitutes for prayer in public school classrooms. Four such cases were recorded in 1982. In addition, first amendment religious violations were alleged in cases involving shared time of private school facilities, attempts to require the teaching of "creation science," and a state-required sex education curriculum. In weighing whether or not a public school program or practice violates the first amendment prohibition against an establishment of religion, courts employ the three-part analysis contained in *Lemon v. Kurtzman.*[202] For a practice or policy to be upheld, an affirmative answer must be given to three questions: Does the policy or practice have a secular purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy or practice avoid an excessive entanglement with religion?

The three-part test was used by the Fifth Circuit Court of Appeals to consider the constitutionality of a Lubbock, Texas school district policy that permitted students to meet voluntarily for prayer purposes before and after school.[203] The original suit was filed in 1979 at a time when the district permitted morning Bible readings over school public address systems, silent prayers in classrooms and the distribution of Bibles to fifth and sixth grade students. By the time the case was heard by the Fifth Circuit, only the voluntary prayer issue and attorney fees were left to be decided; the district had ceased the other practices. In looking at the first of the three parts of the test, secular purpose, the appeals court weighed and rejected the district's claim that the prayer meetings could be justified because they taught students "leadership and communication skills." The court concluded that there were other programs in the schools to accomplish this purpose.

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[199] Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

[200] Smalls v. Board of Educ. of City of New York, 450 N.Y.S.2d 987 (N.Y. Civ. Ct. 1982).

[201] W.J.S. v. Florida, 409 So. 2d 1209 (Fla. Dist. Ct. App. 1982).

[202] 403 U.S. 602 (1971) at 612-13.

[203] Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982).

The court next turned to the primary effect test, concluding that the policy actually advanced organized religion. The fact that the meetings were voluntary was discounted by the court, which cited the well-established principle clearly articulated by the United States Supreme Court in *Engle v. Vitale*[204] that voluntary participation in public school observances does not free the activity from the limitations of the establishment clause. The court also found the prayers violated the establishment test, noting that public facilities and teacher supervision were both provided. Having violated all three parts of the test, an injunction was entered against the prayer sessions. Attorney fees and costs were assessed against the school district.

A Tennessee statute requiring one minute of silence "for meditation or prayer or personal beliefs" at the start of the first class each day in all state public schools was the subject of a federal court challenge.[205] The state sought to demonstrate that the moment of silence had a secular purpose and the district court turned to the history of the act to discover its purpose. After reviewing the arguments made by the legislation sponsors, the court quickly concluded that the legislature was seeking to promote prayer in the public schools, rather than to achieve some secular purpose. Further, the primary effect was the advancement of religion. Because the act failed the first two parts of the *Lemon v. Kurtzman* test, the court made cursory reference to the third and declared the act to be unconstitutional.

Voluntary prayer or meditation fared no better in Massachusetts. The state supreme judicial court was asked by the state house of representatives to offer an advisory opinion on the constitutionality of a proposed act that would allow teachers to start the day with a minute of prayer or meditation.[206] Allowing such prayers would, the court concluded in a brief opinion, clearly violate the establishment clause because there clearly was no secular purpose, but rather an advancement of religion. Two dissenting justices would have permitted the prayers, citing as authority a Massachusetts high court case that permitted the legislature itself to start its session with a prayer.

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[204] 370 U.S. 421 (1962).

[205] Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

[206] *In re* Justices to the House, 440 N.E.2d 1159 (Mass. 1982).

In an opinion making a number of interesting comments, an Alabama district court reluctantly issued a preliminary injunction staying the enforcement of a state statute requiring teachers to lead "willing students" in a prayer that had been written by the Governor's son.[207] the court concluded that there was a substantial likelihood that the plaintiffs would prevail in their argument that the prayer statute violated the establishment clause. The court went on to add that the involvement of courts in school operations meant that courts would have to become involved in "a whole host of areas, such as censoring, that we have heretofore ignored or overlooked."[208] As an example, the court stated, a story with the word "Goddamn" in it might be seen as the advancement of such "religions" as humanism, secularism or agnosticism. The court expressed its personal preference that "a student or teacher should be able to pray at school whenever it would be permissible for him to speak."[209] While stopping the mandatory prayer, the court let stand an Alabama state code requirement that each school day should start with a minute of silence for meditation or voluntary prayer. The court's decision on the rule was made without reference to other cases that have reached opposite conclusions about such practices.

A complicated system of "shared time" and "community education" programs taking place in Grand Rapids, Michigan, private schools was the subject of litigation.[210] The courses and programs were offered by public school employees in the private school classrooms. While technically open to all students, the courses were, in fact, taken only by students enrolled in the private institutions. While most of the courses were electives, some required physical education courses were provided to the private and parochial students by the public school teachers. Whenever teaching such courses, the teachers would post a sign on the classroom wall which read "Public School Classroom." In addition to the salaries, the public schools contributed rent for the classroom space to the private institutions. Testimony in the case revealed that the arrangement had been widely advertised by the school board in its successful attempts to persuade district voters to approve school borrowing referenda.

In applying the *Lemon* tests to this arrangement, the court concluded that the entire class of persons which benefitted from the programs were enrolled in the religious schools. Likewise most of the teachers paid by the public schools were also private school teachers. Thus the programs was neither secular nor neutral in its effect on religion. Finally, the court concluded the plan resulted in the total mixing of government and religion, citing the school board's referendum campaign. While remarking on the "sincerity, intelligence and dedication" of Grand Rapids' educators, the court nevertheless issued a permanent injunction against the programs.

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[207] Jaffree v. James 544 F. Supp. 727 (S.D. Ala. 1982).

[208] *Id.* at 732.

[209] *Id.* at 733.

[210] Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1071 (W.D. Mich. 1982).

An attempt by proponents of "creation science" to require that the perspective be taught with equal prominence to evolution theories was rebuffed in Arkansas.[211] Plaintiffs in the well-publicized case argued that the Arkansas statute violated both the establishment clause and the free speech clause of the first amendment as well as the due process clause of the fourteenth amendment. The district court's carefully worded opinion, however, decided the case on first amendment religious grounds and did not reach the other arguments. Noting that courts had an obligation to attach deference to legislative statements in establishment clause cases, the district court turned to the origins of the Arkansas statute. Looking at the correspondence by the bill's author, the court found "a religious crusade, coupled with a desire to conceal the fact."[212] By attempting to introduce the Biblical version of creation into the schools, the act was seeking to advance religion, thus failing the first part of the *Lemon* test. After observing that "a theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory,"[213] the court found that creation science had neither scientific nor educational value and therefore had only the effect of advancing religion, thereby failing the second part of the test. The classroom monitoring required to assure compliance satisfied the court that there also was excessive governmental entanglement. Thus the court issued an injunction against the act, concluding; "No group, no matter how large or small, may use the organs of government, to foist its religious beliefs on others."[214]

Finally, New Jersey parents challenged a regulation of the state board of education that each local district have a family life education program in public elementary and secondary schools.[215] The New Jersey Supreme Court certified the case directly, before it could be heard by an intermediate court.[216] The rule requires each New Jersey public school student to receive instruction in all aspects of the family life program, including sex education, unless a parent or guardian finds a part of the program objectionable. The student is then excused from that portion. Parents filing the suit claimed the program violated their first amendment rights because students would be exposed to attitudes, goals and values contrary to their own and to those of their parents, and would "thereby be inhibited in their practice of religion."[217]

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[211] McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).
[212] *Id.* at 1261.
[213] *Id.* at 1269.
[214] *Id.* at 1274.
[215] Smith v. Ricci, 446 A.2d 501 (N.J. 1982).
[216] Smith v. Ricci, 446 A.2d 691 (N.J. Memo Dec. 1981).

The New Jersey high court first looked at the alleged violation of the free exercise clause. Focusing on the right of students not to participate, the court concluded that there could be no violation of the clause where participation was voluntary, even if it was sometimes difficult for a student to leave the classroom while the objectionable material was being taught. To eliminate all school curriculum that might offend some group, the court reasoned, would make that group's beliefs state policy, thereby violating the establishment clause.

The court also addressed the appellant's claim that the program established secularism as a religion, thereby violating the establishment clause. Finding no merit in this argument, the court concluded that the program was indeed secular and was neutral in its effect on religion, neither advancing nor prohibiting the discussion of religion in the classroom. This, the court reasoned, was what *Lemon* had envisioned should be the treatment of subjects that had a moral or spiritual component. Thus the program was upheld by the unanimous court, which also rejected assorted procedural claims about the rules' adoption that were raised by the appellants. In rejecting the secularism-as-religion arguments, the New Jersey court followed in the steps of other state courts which have considered and rejected similar arguments in recent years.

4.6c First Amendment Freedom of Expression

Litigation challenging the removal of school library books by the Island Trees, New York, school board was heard by the United States Supreme Court.[218] Six separate opinions were filed by the justices, thereby contributing to the uncertain state of the law in this controversial area. Justice Brennan was joined by Justices Marshall and Stevens in the Court's plurality opinion, Justice Blackmun concurred in the judgment while disagreeing with the central argument made by Brennan. Justice White voted to sustain the outcome, but reserved judgment on all of the outstanding issues in the case. Thus a bare majority of five justices agreed only that a Second Circuit Court of Appeals decision remanding the case to the district court for trial should be upheld.[219] Those looking for guidance from the Supreme Court on whether or not school boards have the power to remove controversial books from school libraries thus will have to wait longer for an answer. Four separate dissents were also filed in the case.

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[217] Smith, *supra*, note 215 at 505.

[218] Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799 (1982).

The issue began in 1975 when the school board, in response to pressure from a politically conservative parents' group, removed nine books from the Island Trees school libraries. The books included works by Kurt Vonnegut, Oliver LaFarge, Eldridge Cleaver and Bernard Malamud. No school official had read the works and the board did not follow its own library policies in taking the action. A "Book Review Committee" appointed by the board later recommended that some of the books be restored, but the board rejected the committee's suggestions. Suit was then filed in district court, claiming that the removal violated the first amendment rights of students. The court issued a summary judgment, holding that "while removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right."[220] The Second Circuit court reversed this decision and, in a precursor of things to come, each of the three judges on the appeals panel wrote a separate opinion. The Second Circuit majority did conclude that the petitioners should have had an opportunity to argue the first amendment issues and that the board should reply by defending their intervention into school library decision making. It was the decision ordering the rehearing which was upheld by the Supreme Court.

In his opinion, Justice Brennan articulated a number of conclusions about the case at hand, none of which attracted support from a majority of the Court. He observed that the case involved library books which were not part of required reading lists and that book removal, not acquisition, was at issue. He suggested that separate standards should apply when these factors were present. He observed that school boards did not have absolute discretion to remove library books simply because they did not like the ideas contained in them, but that genuine issues of fact remained unresolved as to whether or not a constitutional violation was present in the removal, thus necessitating the need for a rehearing. On the way to reaching this conclusion, Justice Brennan argued that

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[219] Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 404 (2d Cir. 1980).

[220] Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387, 397 (E.D.N.Y. 1979).

"the right to receive ideas" was a necessary predicate to the recipients' own ability to exercise first amendment rights.[221] Thus the right to receive ideas or information was protected by the amendment.

It was this extension of the first amendment to which Justice Blackmun objected in his concurring opinion. In espousing a more traditional view of first amendment balancing, he noted the issue was one in which the Court "must reconcile the schools' 'inculcative' function with the first amendment's bar on 'prescriptions of orthodoxy.'"[222] But "with a record as sparse as the one before us," Blackmun was unable to decide whether the school board had exceeded its authority and he voted for the remand. Justice White concurred, complaining about the unnecessary "dissertation" on the first amendment contained in the plurality opinion. He concluded, "We should not decide constitutional questions until it is necessary to do so. . . ."[223] White was the only justice to avoid the first amendment issues.

The four remaining justices joined Chief Justice Burger in his dissent, though each also wrote separately. The Chief Justice argued that the plurality opinion transformed "optional" reading into a "right" and took exception with the distinctions in the Court's opinion between removing and acquiring books and between decisions involving classrooms and those concerned with libraries. "No amount of 'limiting' language could rein in the sweeping 'right' the plurality would create," the Chief Justice argued.[224] Justice Powell, in still sharper language, took issue with the right-to-receive-ideas concept, claiming that the failure to remove nine "vulgar or racist books" symbolized a "debilitating encroachment upon the institutions of a free people."[225] He attached an appendix to his dissent with excerpts from the nine books that he found offensive. Justice Rehnquist found the plurality opinion "largely hypothetical" and argued that the district court was correct in its summary judgment. In her two-paragraph dissent, Justice O'Connor supported the power of school boards to make decisions about books, while not personally agreeing with the board's action with respect to some of the books in the case at hand.

The fractured nature of the Supreme Court's decision, with Justice White not confronting the constitutional issues at all, guarantees further litigation on the question of the first amendment and school libraries. Whether they are, as Justice Brennan characterized, institutions separate from the rest of the school, where access to ideas has additional constitutional protection, or whether they are totally under a school board's control, as argued by the dissenting justices, remains to be decided. Equally unclear are questions regarding the importance of following procedures for book removal, and the question of whether a simple assertion that a work is vulgar or obscene can withstand counterclaims that a book is being removed for political reasons.

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[221] Pico, *supra*, note 218 at 2808.
[222] *Id.* at 2814.
[223] *Id.* at 2817.
[224] *Id.* at 2821.
[225] *Id.* at 2823.

In a case with frequent reference to *Pico*, a Maine district court ordered a banned book restored to a school library.[226] The book, *365 Days*, is a series of nonfictional accounts of the Vietnam War by American combat soldiers. It reposed peacefully in the Baileyville High School library from 1971 to 1981 when a parent asked that it be removed because it contained objectionable language, a four-letter word. While neither the parents, the superintendent, nor the board had read the book, the board ordered it removed. The board ban also prohibited any student from carrying the book on school property, including school buses. Finding a "rudimentary" right to receive information and ideas, the court concluded that the school committee had failed to determine whether harm would befall all students who read the work. The court also noted that the board had no procedures at all for cases such as this and concluded that the ban was unconstitutionally overbroad. An interim injunction ordered the book returned to the school library.

A film version of "The Lottery," a short story by Shirley Jackson in which the citizens of a small town randomly select one person to be stoned to death each year, was shown to American literature students in Forest Lake, Minnesota. A parents' group claimed the film had an impact on students' religious and family values. The school board, after hearings, and against the recommendation of an advisory committee, voted to remove the film from the curriculum. A district court ruled that the board's objections had "religious overtones" and that the film and an accompanying educational "trailer" had been banned because of their "ideological content." This decision was then appealed to the Eighth Circuit Court of Appeals.[227]

Citing *Pico* and its imputed right for students to receive information, the appeals court concluded that the film had been withdrawn simply because the board objected to the ideas in the material. Because the board had refused to justify the removal, the court determined that the decision had a "chilling effect" on the free speech of students and teachers. Placing the burden on the board to explain its decision, the court decided that there had been no government interest expressed that would justify the interference with the students' right to receive information. Thus, while the court found the film was not "comforting," there was no justification for its removal solely because a majority of the board had found some parts of it offensive.

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[226] Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982).

[227] Pratt v. Independent School Dist. No. 831, Forest Lake, 670 F.2d 771 (8th Cir. 1982).

The musical "Pippin," which was to have been performed by Dover, Delaware, high school students, was cancelled by the superintendent when he determined that the play contained sexually explicit scenes. The director and an assistant principal had revised some of the scenes to make them, in their judgment, appropriate for a high school audience. Parents filed suit following the superintendent's decision but a district court concluded that the students' first amendment right of expression had not been abridged.[228] Appeal was taken to the Third Circuit Court of Appeals.[229] The key to the appeals court analysis was the fact that the play was an integral part of the school curriculum. As such, the court expressed reluctance to interfere with the decision of a school administrator. Noting that an unedited version of the play remained in the school library, the court concluded that there had been no limit on the access to ideas within the school.

Students urging a school boycott distributed a leaflet in the Brazil, Indiana, senior high school and were immediately suspended and subsequently expelled for the remainder of the school year, following a formal hearing. The leaflet protested new discipline rules in force at the high school and was distributed less than twenty-four hours after a previous walkout in which fifty-four students had participated. The students were expelled under a section of their school code that permitted the penalty for "interfering with school purposes or with the orderly operation of the school." The students subsequently filed suit claiming that the leaflet distribution was protected by the first amendment.[230] In weighing their claim, the court turned to *Tinker v. Des Moines Independent School District*,[231] The grandfather of all school first amendment cases. In *Tinker*, the right of students to wear black armbands to protest the Vietnam War was upheld, and expression in schools was affirmed so long as the expression did not "materially and substantially" interfere with the operation of the school. While nothing had happened as the result of the leaflet in question, the court concluded that the previous day's walkout was evidence of a threat to the school sufficient to justify the suspension and subsequent expulsion of the students.

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[228] Seyfried v. Walton, 512 F. Supp. 235 (D. Del. 1981).
[229] Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981).
[230] Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981).
[231] 393 U.S. 503 (1969).

4.7 SANCTIONS FOR STUDENT MISCONDUCT

4.7a Suspensions and Expulsions

Cases in this area usually challenge the adequacy of hearings provided before a student is suspended or expelled from school. The United States Supreme Court in *Goss v. Lopez,*[232] held that students had both a property and a liberty interest in a public school education and that even a short term suspension of ten days or less had to be preceded by a minimal due process hearing. Such a hearing must afford the student an opportunity to learn why the suspension is occurring and an opportunity to contest the facts of the case. Suspensions in excess of ten days may require more due process and expulsion cases require full procedural protection.[233] Whether or not a student has had an appropriate hearing is often contested. Courts in recent years have been reluctant to expand the *Goss* hearing requirements and have generally found in favor of school district exclusion policies.

In 1982, the United States Supreme Court heard its first suspension case in five years, affirming the suspension of a tenth grade student who had been consuming alcohol in school.[234] The case has little precedential value and was heard in the fact of a dissent by three justices that the case was "not of the sufficient importance to warrant full briefing and argument."[235] There was no dispute concerning whether or not the student had consumed the alcoholic beverage which led to the student's suspension and subsequent expulsion by the school board for the remainder of the school year. Instead, the district court, with the Eighth Circuit Court of Appeals affirming,[236] ordered the student reinstated because he had been suspended under the school district's rule which prohibits drug consumption, rather than the section banning alcohol consumption. The Supreme Court reversed, holding that the lower courts "plainly erred" by using "their own notions" as to the distinction between alcohol and drugs. The Court concluded that the school board's decision as to which rule was appropriate should be allowed to stand.

A Maine student who admitted using marijuana on school grounds was suspended and subsequently expelled. The student and his parents challenged the decisions, raising a variety of procedural arguments seeking to expand the *Goss* requirements.[237] First, citing *Miranda v. Arizona*,[238] the student argued that his initial questioning about the matter should have been preceded by a warning that he had the right to remain silent and that he had the right to have his parents present before questioning. Next, the student claimed a right to leave the principal's office during questioning. The student also argued that his participation in a drug abuse program required the school board to reduce the expulsion penalty and that the student's "school probation" following his return from the expulsion deprived him of a property interest. The district court rejected all of these novel claims, refusing to expand the *Goss* suspension hearing requirements or to find an error in the district's expulsion procedure. The court decided that there was no precedent or constitutional justification for any of the arguments.

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[232] 419 U.S. 565 (1975).

[233] Wood v. Strickland, 420 U.S. 308 (1975).

[234] Board of Educ. of Rogers v. McCluskey, 102 S. Ct. 3469 (1982).

[235] *Id.* at 3472.

[236] McCluskey v. Board of Educ. of Rogers, 662 F.2d 1263 (8th Cir. 1981).

Expulsion from school is such a serious penalty that courts look closely at the procedure used, generally requiring full due process and overturning school board decisions if the process was seriously flawed. In one such case, the California Supreme Court reversed an expulsion when witnesses to the incident did not testify.[239] The plaintiff had been expelled for participating in an unprovoked assault on two students following a football game. The assault was alleged to have been racially motivated. The facts in the case were disputed by the student charged in the incident, who maintained he had not struck either of the students. In reviewing the "sharp dispute" about the facts of the case, the California court concluded that the expulsion should be set aside because the plaintiff did not have the opportunity to confront his accusers.

An expulsion of a student for missing a class more than 12 times was upheld by the Arkansas Supreme Court.[240] The school district's rules permitted expulsion for "excessive absenteeism" and also provided that a student could not receive credit in any course in which absences were recorded on more than twelve days. The plaintiff was absent totally from school only four days but failed to attend his physical science class fourteen times. The court concluded that the expulsion rule was within the power of the board to establish and refused to interfere with the decision, even though the rule did not define "excessive absenteeism." In a sharp dissent illuminating some of the issues in the case that the majority opinion avoided, one justice argued that the school district had the obligation to proceed under the state's truancy law, which requires an investigation into the causes of the absenteeism. The dissent concluded: "Even though appellant probably received procedural due process, he certainly did not receive substantive due process."[241]

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[237] Boynton v. Casey, 543 F. Supp. 995 (D. Me. 1982).

[238] 384 U.S. 436 (1966).

[239] John A. v. San Bernardino City Unified School, 187 Cal. Rptr. 472 (Cal. 1982).

[240] Williams v. Board of Educ. for Mariana, 626 S.W.2d 361 (Ark. 1982).

Three cases raised questions about the adequacy of procedures used when students were first suspended and then subsequently expelled for the same misbehavior. As a rule, courts required the correct procedures be followed for both steps. In a Michigan case, a suspension of students for breaking into the school and burning attendance records started as a suspension but took on the character of an expulsion.[242] *Goss* procedures were followed in the initial suspension, but the series of administrative steps thereafter undertaken was extremely convoluted. The students' parents claimed that the students had been expelled while the school maintained it was seeking the placement of the students in another school. After wading through these conflicting claims, the district court finally concluded that the extended suspension had taken on the character of an expulsion and the failure to hold a formal hearing on the charge violated the students' due process rights. Following the Supreme Court's decision in *Carey v. Piphus*,[243] the court concluded that the students' rights had been violated but they also clearly were guilty of the offense at issue and therefore were entitled to one dollar in compensatory damages.

A Kentucky appeals court sustained the policy of a school district which automatically suspended students found consuming alcohol at school, but let stand a lower court decision that automatic expulsion for alcohol consumption was arbitrary.[244] The students in question had been found drinking on a school-sponsored band trip. The appeals court concluded that the lower court had been correct in its interpretation of the state suspension and expulsion statute which holds that suspension was mandatory for a first offense of this sort. Because mandatory expulsion is not mentioned in the statute, the appeals court concluded that the lower court did not exceed its authority in holding that the expulsions were unreasonable.

A Pennsylvania student who was suspended and then expelled for assaulting another student while under the influence of alcohol brought suit challenging the validity of the expulsion.[245] The student based his case on the grounds that he had been suspended for thirteen days before the expulsion hearing was held, in violation of the Pennsylvania code requiring a maximum of ten days before a hearing. The appeals court concluded that the period of time was excessive, but that the error was not of sufficient magnitude to require reversing an otherwise proper expulsion.

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[241] *Id.* at 364.

[242] Darby v. School, 544 F. Supp. 428 (W.D. Mich. 1982).

[243] 435 U.S. 247 (1978).

[244] Clark Cty. Bd. of Educ. v. Jones, 625 S.W.2d 586 (Ky. Ct. App. 1981).

[245] Porter v. Board of School Dirs., 445 A.2d 1386 (Pa. Commw. Ct. 1982).

Another case also raised questions about a procedural error. A Wisconsin appeals court upheld an expulsion which had been reversed by the state superintendent of public instruction, even though some of the testimony presented at the hearing was hearsay.[246] The court noted that a school board could not be expected to know all the "niceties" of hearsay evidence and that the error in admitting the testimony was de minimis.

A Mississippi high school student who carried a switchblade knife to school was expelled for the remainder of the school year and sought an injunction to prevent the penalty. The injunction request was denied by a district court and the student's parents appealed to the Fifth Circuit Court of Appeals.[247] The student had admitted taking the knife to school and had received a hearing before the school board. On appeal, the plaintiffs contended that the school board's hearing was flawed because there was inadequate notice and no opportunity to confront witnesses. Instead, taped testimony from some witnesses was played for the school board. In considering this flaw, however, the court focused on the fact that the plaintiff had never denied the knife charge. Both the plaintiff and his mother had participated in the expulsion hearing and the court held that the flawed procedures were not fundamentally unfair or legally prejudicial. The student responded to this adverse decision by filing a request for a rehearing by the Fifth Circuit en banc.[248] While recommending that the school board change its practice regarding the use of taped testimony, the appeals court refused to grant the request, noting that the evidence against the student was "so overwhelming" that a school board rehearing would not change the result.

An eighth grade student who struck her teacher was suspended for the remainder of the school year and filed suit claiming the penalty was racially motivated.[249] Other procedural irregularities in the suspension hearing were also alleged, but these were dismissed by the court because the student had been represented by counsel at the suspension hearing and because no specific procedural flaw was cited. The court concluded that the racial discrimination charge also was unsupported by any testimony and refused to find that the plaintiff's mother, who was not rehired as a teacher aide by the school system, had been discriminated against for challenging the suspension.

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[246] Racine Unified School Dist. v. Thompson, 321 N.W.2d 334 (Wis. Ct. App. 1982).

[247] McClain v. LaFayette Cty. Bd. of Educ., 673 F.2d 106 (5th Cir. 1982).

[248] McClain v. LaFayette Cty. Bd. of Educ., 687 F.2d 121 (5th Cir. 1982).

[249] Diggles v. Corsicana Indep. School Dist., 529 F. Supp. 169 (N.D. Tex. 1981).

A Nebraska student challenged his three-day suspension for fighting in a case heard by that state's highest court.[250] The student's claim was based on the suspension notice he had received indicating that he was being suspended for one incident, but the hearing he and his parents attended considered three previous altercations as well. Concluding that the case was "utterly frivolous," the Nebraska Supreme Court found that the suspension process had afforded the student adequate due process.

While the cases discussed in this section focus on procedural matters, one 1982 case raised substantive due process issues.[251] A high school senior was involved in a football game drinking incident and had been offered the choice of an in-school or out-of-school suspension. She chose the in-school penalty, but missed several class examinations. A lower court ruled that this denied the student her rights to substantive due process. Both parties appealed, the school district seeking reversal of the decision, and the parents seeking dismissal of the district's appeal on the grounds of mootness, as well as claiming attorney fees. The appeals court sustained the mootness claim, noting that the student had been graded in all the courses in question and had entered college. As to the attorney fees, the court concluded that fees awarded under 42 U.S.C. section 1988 could be made only if the issues in the case presented a violation of specific constitutional guarantees. The court denied the fees, noting the issues raised did not represent a sufficiently grave constitutional violation. Citing *Wood*, the court held that section 1988 was not intended to justify fees in cases involving simple administrative errors. In another case, a Georgia student also sought damages for a wrongful suspension.[252] A state appeals court held that the suspension might have been "hurried and erroneous," but was not willful or malicious, and it refused to award damages.

In a discipline case of a different sort, a California school district charged a student with a misdemeanor for threatening to hit a teacher.[253] The California education code prohibits a "parent, guardian or other person" from insulting or abusing a teacher. The district argued that a student could be treated as an "other person" under this provision. The appeals court disagreed, concluding that the code section was clearly intended for nonstudents who enter the school grounds to harass teachers.

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[250] Walker v. Bradley, 320 N.W.2d 900 (Neb. 1982).

[251] Myre v. Board of Educ. of Seneca Twp., 439 N.E.2d 74 (Ill. App. Ct. 1982).

[252] Dillard v. Fussell, 287 S.E.2d 96 (Ga. Ct. App. 1981).

[253] *In re* G.R.B., 182 Cal. Rptr. 53 (Cal. Ct. App. 1982).

4.7b Corporal Punishment

Corporal punishment cases arise in states which have statutes or state code provisions permitting the practice. Claims that the punishment was excessive sometimes are made, though their number has declined in recent years. In the single case recorded in 1982,[254] West Virginia parents sought a writ of mandamus seeking to have that state's code on corporal punishment declared unconstitutional because it violated the cruel and unusual punishment provision of the state constitution.[255] The parents also argued that the state board of education had an obligation to promulgate rules regarding the use of corporal punishment. The case began when an eleven-year-old elementary student required hospital treatment following a paddling administered by his principal.

After accepting the writ of mandamus because of the magnitude of the issues involved, the West Virginia high court turned to the central issue. The school district argued that the doctrine of in loco parentis gave them the authority for the paddling, while attorneys for the parents argued that there must be limits on the discretion exercised by school personnel. The court sustained the parents' position, noting that *Goss* and other court cases had eroded the doctrine. In addition, the court cited the West Virginia child abuse statute as evidence that in loco parentis was no longer an unlimited license to treat students without principled limits. The court then accepted the cruel and unusual punishment argument "by analogy," while not reaching the constitutional claim, and banned the use of paddles and related devices. The court explicitly approved the continued use of corporal punishment "by hand" and took pains to explain that the forceful separation of unruly students was still permitted.

The West Virginia court went on to say that minimal due process rights must be afforded to students about to be punished. Borrowing from *Goss*, the court required that the student be given an opportunity to explain the event, and then that the punishment be carried out in the presence of an outside neutral observer. The state board of education was ordered to promulgate rules consistent with the decision. The West Virginia decision goes further than the most recent United States Supreme Court paddling case, wherein justices refused to see corporal punishment as cruel and unusual punishment or to require a hearing before its administration.[256]

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[254] Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680 (W. Va. 1982).
[255] W. Va. Code § 18-2-5.
[256] Ingraham v. Wright, 430 U.S. 651 (1977).

4.8 TESTING AND PLACEMENT

The increased use of competency tests as a graduation requirement has given rise to lawsuits filed on behalf of minority group and handicapped students. In an important 1981 case challenging the Florida state competency test, the Fifth Circuit Court of Appeals ruled that the burden was on a school system to prove that their graduation test had "curricular validity" or tested items which actually were taught in the system.[257] A 1980 Georgia case, filed prior to the Fifth Circuit decision, approved the use of the California Achievement Test by the Tatnall county board of education as a graduation requirement.[258] A Georgia federal district court subsequently voided the use of the test, basing its decision on the Florida case.[259]

The Tatnall county board returned to district court in 1982 to show that the material on the California Achievement Test had actually been taught.[260] The district argued that the test was necessary to motivate an "apathetic school population" and to indicate which students were in need of remedial instruction. To prove that the test was valid, the district introduced evidence that the test questions reflected the district's curriculum, presenting testimony by both an outside expert and district employees. The plaintiffs countered with an expert who reached the opposite conclusion. In weighing its decision, the court was clearly unhappy with its role in deciding whether or not the test was fair, claiming that this was the first instance in which a court had to make a substantive academic decision. The court then decided that some deference had to be given to the authority of school personnel and concluded that the school district had made a "sufficient showing" that the test was fair.

The failure of handicapped students to pass minimal competency tests has been considered by courts in recent years. A New York court, for example, ruled in 1981 that two years' notice of a new graduation requirement was inadequate for handicapped students.[261] In a 1982 case, an Illinois district court considered a similar issue but reached the opposite conclusion.[262] The Peoria school district had established a policy requiring all students to pass examinations in reading, language arts and mathematics before they could receive a high school diploma.

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[257] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

[258] Wells v. Banks, 266 S.E.2d 270 (Ga. Ct. App. 1980).

[259] Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).

[260] Anderson v. Banks, 540 F. Supp. 761 (S.D. Ga. 1982).

[261] Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).

[262] Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (S.D. Ill. 1982).

Plaintiffs in the case had received one year's advance notice but had been unable to pass the tests, thereby receiving certificates of program completion rather than diplomas. The Illinois superintendent of public instruction then issued an order requiring that the handicapped students be awarded diplomas, concluding that federal law required that the tests be modified to minimize the effects of the students' handicapping conditions and that insufficient notice of the new requirement had been given. The school district went to federal court to have the superintendent's order overturned.

In a decision that made few references to cases in other jurisdictions, the district court reversed the superintendent's decision. A modified test, the court concluded, "would be a perversion of the program to lend meaning to the diploma as a record of educational achievement."[263] While a blind student might be offered the test in braille, the court rejected any alterations of test content. On the notice question, the court concluded that one year's notice was adequate, asserting that the only reason a student could not pass the test after that time was the failure of the student's instructional plan to include the curriculum on which the test was based. This argument brought the court back to its first conclusion, that no modification of the test itself was required for handicapped students. Concluding that cases in other jurisdictions were in no way controlling, the court reversed the superintendent's order. It is likely that this decision will be appealed.

Pennsylvania students who were not selected for their school's gifted and talented program filed suit challenging the state board of education regulations used by their local school district to identify program participants.[264] At the heart of their case, they alleged that they were receiving an inferior education because they had not been selected, in violation of their right to equal educational opportunity. They sought $60,000 in damages and admission to the program. In response, the state argued that the plaintiffs failed to state a cause of action, had not demonstrated that they had been denied the right to be evaluated for admission, and did not exhaust their administrative remedies. In reviewing the issues presented, the court concluded that the plaintiffs had a constitutional right to receive an education but not the right to dictate what form that education must take. Because the plaintiffs did not claim that the children were exceptional, or had been misclassified, the court concluded that they did not have standing to bring the suit. The court also decided that the plaintiffs had not exhausted the administrative remedies available to them under the Pennsylvania code they were challenging. Accordingly, the court dismissed the case.

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[263] *Id.* at 728.

[264] Lisa H. v. State Bd. of Educ., 447 A.2d 669 (Pa. Commw. Ct. 1982).

4.9 DESEGREGATION

4.9a Systemwide Remedies

Two cases involving state-adopted referenda to prohibit mandatory busing for school desegregation were decided by the Supreme Court in 1982. A desegregation plan had been enacted in Seattle which involved the extensive use of forced busing. Initiative 350 was then passed by State of Washington voters in 1978 prohibiting a school board from requiring a student to attend a school farther than the one next closest to home. This, in effect, ended the use of busing as a desegregation tool in Washington. A federal district court, however, found Initiative 350 to be unconstitutional,[265] and this ruling was upheld by a federal court of appeals in 1980.[266] The case was then appealed to the Supreme Court.

Justice Blackmun, writing for the 5-4 majority, found that while the initiative prohibited busing for desegregation purposes, busing for other educational purposes was unaffected. He concluded, therefore, that the initiative violated the fourteenth amendment.[267] He added that the initiative also restructured the Washington educational process by placing the authority over some busing at the state level while leaving all other school powers in the hands of local boards. Blackmun said this placed an undue burden on minorities, quoting *Hunter v. Erickson*, "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race."[268]

In *Crawford v. Board*,[269] the Supreme Court by an 8-1 vote affirmed a 1982 California Appeals Court ruling[270] which upheld a statewide referendum ending mandatory busing to achieve school desegregation in California. The referendum differed from Washington's in that it did not prohibit racial busing entirely. Rather, it limited state courts to ordering mandatory busing only in cases where a federal court would do so to remedy a violation of the fourteenth amendment. The Supreme Court majority agreed that California was merely receding from its previous, more stringent standard. Writing for the majority, Justice Powell noted, "It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the state had thereby violated it."[271] The Court rejected the argument that the referendum employed an invidious racial classification and was enacted with discriminatory intent, concluding, "The mere repeal of race related legislation is not unconstitutional."[272] A concurring opinion by Justice Blackmun distinguished *Washington v. Seattle* from *Crawford* by noting that the former case unconstitutionally reallocated educational authority to the state level making it harder for minorities to pursue racial equality.[273]

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[265] Seattle School Dist. No. 1 of King Cty., Washington v. Washington, 473 F. Supp. 966 (W.D. Wash. 1979).

[266] Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 966; 633 F.2d 1338 (9th Cir. 1980).

[267] Washington v. Seattle School Dist. No. 1, 102 S. Ct. 3187 (1982).

[268] 393 U.S. 391 (1969).

[269] Crawford v. Board of Educ. of City of Los Angeles, 102 S. Ct. 3211 (1982).

[270] Crawford v. Board of Educ. of City of Los Angeles, 170 Cal. Rptr. 495 (Cal. Ct. App. 1981).

Desegregation plans for schools in other parts of the country continued to be reviewed by lower courts. In Little Rock, Arkansas, a district court granted the board of education permission to revise its desegregation plan.[274] The board wanted to close a center attended by all seventh grade students in the district because of declining enrollments and decreased funding. Because this was the only junior high school in a black neighborhood, the closing was opposed on the basis that it would place a disproportionate burden on black children because more blacks than whites would require busing. The district court's ruling was appealed to the Eighth Circuit Court of Appeals.[275] The court agreed that "[t]he burden of desegregation should be shared as equally as possible between blacks and whites,"[276] and used a set of factors developed by the Tenth Circuit Court to evaluate the case.[277] Using these, they found that enrollment and pending fiscal problems were valid nonracial reasons for closing the school. They also found that the school's location made it the best choice for closing. Finally, they held that the burden on black children would be essentially the same as under the original court-approved desegregation plan. Thus the school closing was approved.

In a complex case increasingly involving cross-district implications, school desegregation in St. Louis continued to be argued before the Eighth Circuit Court of Appeals.[278] In 1980, the district court responded to a remand order from the Eighth Circuit by developing a systemwide desegregation plan for St. Louis schools.[279] The plan was to include suburban schools and the state was told to pay one-half of the cost because it was held to be equally liable in causing the segregated schools. The Eighth Circuit heard appeals of the desegregation plan by four parties, who challenged either its design or financing.[280] These appeals were rejected and the district court's plan was upheld. Litigation shuffleboard continued as eighteen more appeals then were heard by the Eighth Circuit.[281] The court grouped the appeals into several categories and decided which would be heard. The court admonished the parties to "avoid filing premature and piecemeal interlocutory appeals"[282] and said that it would hear the appeals over which it held jurisdiction in January of 1982.

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[271] Crawford, *supra*, note 269 at 3217.

[272] *Id.* at 3219.

[273] *Id.* at 3222.

[274] Davis v. Board of Educ. of North Little Rock, 520 F. Supp. 108 (E.D. Ark. 1981).

[275] Davis v. Board of Educ. of North Little Rock, 674 F.2d 684 (8th Cir. 1982).

[276] *Id.* at 687.

[277] *Id.*

[278] Liddell v. Board of Educ., St. Louis, 677 F.2d 626 (8th Cir. 1982).

[279] Liddell v. Board of Educ., St. Louis, 491 F. Supp. 351 (E.D. Mo. 1980).

On January 11, 1982, appeals of the desegregation orders of district Judge William Hungate were again heard.[283] The Eighth Circuit Court of Appeals continued to hold that the state was obligated to pay one-half of the desegregation expenses as well as certain costs of a voluntary interdistrict plan because of its role in creating the segregation. The planned merger of city and county vocational programs was also upheld, and the court refused to hold that Judge Hungate should excuse himself from further interdistrict hearings saying that although they lacked jurisdiction on the issue there was no legal basis for refusal. The court also refused to stop seventeen suburban school districts from being included as defendants. The case again was remanded to the district court for further proceedings.

Attempts to desegregate the Youngstown, Ohio, school system also continued. Plaintiffs appealed a district court ruling[284] which found that school officials had assigned a disproportionate number of black teachers to predominantly black schools, but were not guilty of operating a segregated school system. The Sixth Circuit Court of Appeals said "that it was not their function to determine whether they would have decided that an intentionally segregated school system had been created or maintained. Rather it was to review the district court's opinion, the record, briefs and oral arguments, and decide whether they left the court with a definite and firm conviction that a mistake had been committed."[285] There was a voluminous record with evidence supportive of either side but the appeals court was not convinced a mistake had been made, and they affirmed the findings of the lower court. The appeals court also concluded that the state was not liable for failing to investigate the condition of the school district. Because no violations existed, except for the teacher assignments, the state could not be liable for failure to correct or prevent them.

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[280] Liddell v. Board of Educ., St. Louis, 667 F.2d 643 (8th Cir. 1981).

[281] Liddell v. Board of Educ., St. Louis, 693 F.2d 721 (8th Cir. 1981).

[282] *Id.* at 727.

[283] Liddell, *supra*, note 278.

[284] Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985 (D. Ohio 1978).

[285] Alexander v. Youngstown Bd. of Educ., 675 F.2d 787 (6th Cir. 1982).

In New York, a district court ruled that the Buffalo board of education had carried the burden of demonstrating the need for additional funds in order to ensure compliance with the court's desegregation orders.[286] This was the second year in a row that the board had to go to court to force the city to provide additional funds. Under New York law, the school board is financially dependent on the city. Plaintiffs in the case asked that the desegregation plan be expanded to include six more elementary schools. The court ruled against this, saying that "it would be financially burdensome, disruptive, and would not significantly benefit the desegregative effort."[287]

The continuing saga of desegregation in Boston, Massachusetts, was before the First Circuit Court of Appeals.[288] The City of Boston, the Boston school committee and the Boston home and school association appealed court ordered desegregation. The court order had rejected "linkage" and "beacon" school concepts proposed by the appellants to ameliorate the effect of school closings. The order also closed two elementary schools in addition to the ten proposed to satisfy the court, ordered further student assignment modifications, and refused to let a high school be converted into a middle school.

The appeals court noted that only the student assignment, "linkage" and "beacon" school issues were undecided. The court ruled that the district court's insistence on a student assignment plan more in line with the goals stated in its 1975 plan, instead of the school committee's less comprehensive plan, was not an abuse of discretion. The appeals court also agreed with the rejection of the "beacon" school proposal. They found the idea to have been a last-minute addition that was incomplete and required reworking. The appeals court ruled in a similar fashion on the "linkage" school proposal which had also been added at the last minute. The court also affirmed the rejection of a motion to terminate the district court's jurisdiction over student assignments. The court noted that progress had been made in desegregation and urged renewed efforts toward the achievement of a unitary school system and court disengagement.

The Boston teachers union appealed a court order shielding teachers at South Boston High School from layoffs, which conflicted with the system's seniority system.[289] The appeals court held that the district court had correctly concluded that layoffs of a great portion of faculty would undermine desegregation efforts, and the court could therefore enter an order shielding teachers.

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286. Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982).
287. *Id.* at 484.
288. Morgan v. McDonough, 689 F.2d 265 (1st Cir. 1982).
289. Morgan v. O'Bryant, 687 F.2d 510 (1st Cir. 1982).

The court order which desegregated the Waco, Texas, school system in 1973 divided the district into attendance zones. Many students were reassigned to new schools. Some parents subsequently claimed that their children lived with someone else in order to allow them to attend a desired school, and the school board adopted a policy that allowed only pupils residing with a parent, guardian, or managing conservator to attend school tuition free. A trial court refused to invalidate the policy and the plaintiffs appealed.[290] The state appeals court held that the policy did not violate section 21.031 of the Texas Education Code which deals with the right to attend public free schools. The court found that there was ample evidence supporting the need for the policy to enforce federal court-ordered desegregation.

4.9b Cross-District Remedies

Courts have continued to order cross-district school desegregation plans where several units of government have been held responsible for school segregation. This has led to protracted litigation by parties both for and against desegregation plans in several cities.

The decade-old desegregation struggle in western Pennsylvania continued with several cases appearing in 1982. In the spring of 1981, an appeals court had ruled that no further delay in fashioning a desegregation remedy for the General Braddock Area School District would be permitted.[291] A multidistrict remedy involving the merging of five school districts into one was subsequently approved and implemented in the fall of 1981.[292] This plan, ordered by a district court, was appealed to the Third Circuit Court of Appeals on two grounds.[293] First, the original 1973 district court's finding of de jure segregation[294] was challenged. Second, the multidistrict remedy ordered and implemented was challenged. The appeals court found that, although the finding of de jure segregation occurred before *Keyes*,[295] the district court had satisfied the standard set forth in *Keyes* that proof of segregative intent or purpose is needed to establish a prima facie case of de jure segregation.[296] The court listed nine examples of direct evidence of segregative intent or purpose which had been cited by the district court in its decision. The appeals court also approved the district court's additional use of circumstantial or objective evidence to find segregative intent. This approach was supported by Supreme Court decisions in *Dayton II*[297] and *Columbus*.[298] The appeals court then concluded that the finding of de jure segregation was fully supported by the record.

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[290] Jackson v. Waco Indep. School Dist., 629 S.W.2d 201 (Tex. Ct. App. 1982).

[291] Hoots v. Commonwealth of Pa., 639 F.2d 972 (3d Cir. 1981); *cert. denied*, 101 S. Ct. 3113 (1981).

[292] Hoots v. Commonwealth of Pa., 545 F. Supp. 1 (W.D. Pa. 1981).

[293] Hoots v. Commonwealth of Pa., 672 F.2d 1107 (3d Cir. 1982).

[294] Hoots v. Commonwealth of Pa., 359 F. Supp. 807 (W.D. Pa. 1973).

[295] Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).

[296] Hoots, *supra*, note 293.

When considering if the multi-district remedy was proper, the appeals court used *Milliken*[299] as the controlling case. The Pennsylvania State Board of Education and county school boards were found guilty of an interdistrict violation when they created the intentionally segregated district.[300]

Part of the district court's desegregation plan[301] involved the use of an interim committee to govern the new school district. The composition of this committee was challenged in the Third Circuit Court of Appeals.[302] The court held that because the interim committee had been replaced by a board of school directors the issue was moot. They further held that the composition of the board and the timing of elections were acceptable.

When the five Pennsylvania school districts were merged into one, each remained financially independent until the end of the school year in June, 1981. At that time, two school districts attempted to rebate surplus monies back to the taxpayers of their districts in order to prevent the funds from becoming property of the new school district. The district court issued a preliminary injunction preventing this. A group of taxpayers from the two districts, named "Save Our Schools," attempted to intervene in the issue of whether the injunction should be made permanent. The district court denied their motion to intervene and this was upheld by the Third Circuit Court of Appeals.[303] The district court subsequently made the injunction permanent.[304]

The original desegregation plan for the G.B.A.S.D. was intended only for the 1981-82 school year. A plan to furnish complete desegregation of the five school districts, now known as the Woodland Hills School District, was ordered by the district court in May, 1982.[305] The court listed five criteria for an effective desegregation plan; it should be in effect and operating for the start of the 1982-83 school year, it should ensure that no racially identifiable schools remain, the burden of desegregation should be shared equally between blacks and whites, facilities within the traditionally black community should be maintained as operational where practical, and maintenance of the highest educational standards for all students in the district should be ensured.[306] The desegregation plans offered by the new school board, although revised several times, were found to be inadequate. A plan offered by the plaintiffs involving the clustering of schools into attendance zones was then adopted by the court with a few modifications. The court felt hopeful that after eleven years of litigation, this plan would finally desegregate the new Woodland school district and "provide all students of the district with the greatest possible range of educational opportunities."[307]

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[297] Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[298] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[299] Milliken v. Bradley, 418 U.S. 717 (1974).

[300] Hoots, *supra*, note 294.

[301] Hoots, *supra*, note 292.

[302] Hoots, *supra*, note 293 at 1124.

[303] *Id.* at 1133.

[304] Hoots v. Commonwealth of Pa., 535 F. Supp. 1194 (W.D. Pa. 1982).

[305] Hoots v. Commonwealth of Pa., 539 F. Supp. 335 (W.D. Pa. 1982).

Who should bear the cost of the interdistrict desegregation plan in Indianapolis was at issue before the Seventh Circuit Court of Appeals.[308] the court of appeals first concluded that it was within the district court's remedial power to allocate the costs of a desegregation plan. Because the state of Indiana had been found solely liable for the interdistrict violations,[309] the district court was sustained in holding the state solely liable for the costs of remedying the violations. As the appeals court put it, "[t]he wrongdoer cannot evade the cost of remedying the wrongdoing."[310] This included the cost of extracurricular transportation and reimbursement for financial losses caused by transferred students. The state appealed this holding but the United States Supreme Court denied certiorari in December, 1982.

Litigation involving the desegregation of the Cincinnati school system, which began in 1963, appeared to be moving closer to a conclusion. In a long and detailed opinion, the district court addressed the issue of whether the Supreme Court's decisions in *Columbus*[311] and *Dayton II*[312] renderd some of the previous litigation in Cincinnati obsolete.[313] The court declared that although *Columbus* and *Dayton II* have not overruled or radically departed from earlier Supreme Court cases, they have established several supplemental issues not previously litigated in Cincinnati. Plaintiffs were therefore ruled not to be collaterally estopped from litigating if the school board's practices prior to *Brown*,[314] whether remote or intentional, had caused segregation which was not then eliminated after 1954. In 1975, when an appeals court last ruled on this case,[315] *Columbus* and *Dayton II* had not been decided so desegregation law had not evolved to a point where this was an issue. The Court also ruled, however, that collateral estoppel could be invoked to prevent relitigation of whether the school board's practices from 1954 to 1965 had in themselves caused segregation. The school board's practices during this time period were originally litigated in 1965.[316] The 1975 appeals court decision upholding this ruling was not changed by *Columbus* and *Dayton II*, said the court.

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[306] *Id.* at 343.

[307] *Id.* at 351.

[308] United States v. Board of School Comm'rs, Indianapolis, 677 F.2d 1185 (7th Cir. 1982).

[309] United States v. Board of School Comm'rs, Indianapolis, 456 F. Supp. 183 (S.D. Ind. 1978).

[310] United States, *supra*, note 308 at 1188.

[311] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[312] Dayton Bd. of Educ v. Brinkman, 443 U.S. 526 (1979).

[313] Bronson v. Board of Educ., 535 F. Supp. 846 (S.D. Ohio 1982).

Plaintiffs representing minority students brought suit in district court to prevent the closing of a predominantly black elementary school in Cincinnati.[317] The plaintiffs' motion for a preliminary injunction was denied when they failed to demonstrate a likelihood of success on the merits of their claim, or that irreparable harm would occur without the injunction. The court said that the school closing appeared to be based on substantive policy factors and that it did not appear to have a disproportionate effect on black or Appalachian students. The court did not agree with the school board's motion to dismiss the suit entirely, however, because arguments regarding the decision might be made for which no adequate remedy of law would then exist. The court did dismiss the portion of the claim in which plaintiffs asserted that their due process rights had been violated through assignments to new schools. The court held that the plaintiffs had no right under Ohio law to attend a particular school and that there was no recognizable property interest in attending a particular school. The court also dismissed the charge that the school closing discriminated against Appalachians in violation of Title VI of the Civil Rights Act, which protects against discrimination on the basis of race, color, or national origin. The court held that national origin was not meant to include Appalachians.

4.9c Developments Under *Swann* and *Keyes*

Desegregation in Denver continued to be supervised by the federal district court, as it has since *Keyes* in 1972.[318] The district court last year approved a desegregation plan for the 1982-83 school year that reduced the number of children being bused by 2,600.[319] The modified lan was the result of negotiations between the school board and atrneys for minority children. The plan was accepted only on a oneear trial basis, because the court had considerable reservations as to ie commitment to desegregation of the school board. The board had ranted to end mandatory busing for desegregation entirely. Court valuation and monitoring were to continue.

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[314] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[315] Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975).

[316] Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio 1965).

[317] Bronson v. Board of Educ., 550 F. Supp. 941 (S.D. Ohio 1982).

[318] Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).

[319] Keyes v. School Dist. No. 1, 540 F. Supp. 399 (D. Colo. 1982).

Plaintiffs in Akron, Ohio, were unsuccessful in overturning a 1980 uling[320] that found the Akron school board to be innocent of gregative intent.[321] Three liability claims were argued against the :hool board in the appeal. First, it was claimed that the school board ad used attendance zones with segregative intent, resulting in a dualice system by 1965. The appeals court said that this issue had been ecided in 1968 and could not be relitigated, quoting a Sixth Circuit ase[322] as a guide on this issue.

The plaintiff-appellants also claimed that after 1965 the school oard had failed to dismantle the dual system which was by then in lace. The court rejected this, holding that proof of intent is constituonally required for de facto segregation, and the board's innocence 'as no longer in question. The school board was also charged with beig liable for the discriminatory housing practices of several other overnment agencies. The appeals court said that it would place too eavy a burden on the school board to remedy practices that they were ot responsible for.

In 1981, a federal district court approved a desegregation plan repared by the board of education in Nashville.[323] Plaintiffs in the ase, who had also prepared a desegregation plan, appealed the decion.[324] Citing *Swann*,[325] the appeals court found fault with two areas f the district court ruling. The district court had ordered that there be minimum presence of fifteen percent of either race in all middle :hools and high schools. The appeals court said that it was not appropriate to allow schools to have up to eighty-five percent of one race a school system with a sixty-eight percent white population. Noting iat *Swann* recognized an individual has "no constitutional right to ny particular degree of racial balance,"[326] the court also recognized that every effort must be made to eliminate one-race schools and thus a dual school system. The court suggested use of the formula used in *Columbus:*[327] no more than a fifteen percent deviation from the school system's racial proportions in any school.

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[320] Bell v. Board of Educ., Akron Pub. Schools, 491 F. Supp. 916 (N.D. Ohio 1980).

[321] Bell v. Board of Educ., Akron Pub. Schools, 683 F.2d 963 (6th Cir. 1982).

[322] Bronson v. Board of Educ., 525 F.2d 344 (6th Cir. 1975).

[323] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 511 F. ipp. 1363 (M.D. Tenn. 1981).

[324] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 14 (6th Cir. 1982).

[325] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[326] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 14, 818-819 (6th Cir. 1982).

The district court had also ordered that grades kindergarten through four be set up as neighborhood schools, citing the advantages of a neighborhood school system for elementary students. Using Chief Justice Burger's unanimous opinion in *Swann*, the appeals court said that "no matter whether neighborhod schools may be desirable on some grounds, their advantages cannot outweigh the constitutional requirement to desegregate the schools."[328] The appeals court also upheld the conversion of a high school into a middle school and the construction of a new high school because they were not "based on clearly erroneous findings or founded in a racially discriminatory purpose."[329] The case was then remanded to the district court for further proceedings.

4.9d Other Federal Cases

The Tenth Circuit Court of Appeals refused to allow two black students to bring independent actions in the desegregation litigation involving Topeka, Kansas.[330] In 1979, plaintiffs were successful in reopening the historic *Brown v. Board of Education* case.[331] The appeals court held that an independent action could not be brought while the original case was still pending because the plaintiffs could still file a motion to intervene.

4.9e Fifth Circuit Cases

Fifth Circuit courts continued to hear a number of ongoing desegregation disputes. In Dallas, a large number of minority parents opposed continued use of busing for children in grades four through eight. The Dallas Independent School District submitted a plan to the district court that would have allowed minority students to remain in their neighborhood schools, waiving their constitutional rights to be bused to a desegregated school.[332] This was known as the Minority Neighborhood Option Plan. The plan posed a dilemma for the court, which had to balance the constitutional mandate for school desegregation and minority disenchantment with busing which, the court said, "has considerable merit on both law and equity."[333] The district court held that the plan had to be looked at within the constraints of the appeals court remand of 1978,[334] directing the court to apply *Swann*[335] mandated transportation techniques. The court concluded it could not, therefore, authorize such a drastic change in busing as the plan would entail. The court also held that the plan collided "with the command of the law to achieve maximum desegregation,"[336] and that desegregation achievements already accomplished would be adversely affected.

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[327] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

[328] Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814 (6th Cir. 1982).

[329] *Id.* at 824.

[330] Miller v. Board of Educ. of Topeka, 667 F.2d 946 (10th Cir. 1982).

[331] Brown v. Board of Educ. of Topeka, 84 F.R.D. 383 (D. Kan. 1979).

[332] Tasby v. Wright, 542 F. Supp. 134 (N.D. Tex. 1982).

The school board in East Baton Rouge Parish, Louisiana, was ordered to implement a district court desegregation plan for its schools in 1981.[337] The plan was ordered to be implemented in two stages: elementary schools in 1981, followed by secondary schools in 1982. The court granted the request of the school board to submit a plan of its own for desegregating the secondary schools. The board submitted a plan along with the proposals of various citizen groups in October, 1981. The district court said it could not accept the board's desegregation plan because it did not eliminate all one-race middle schools.[338] The citizen's proposals were rejected because they dealt only with specific schools and not the entire school system. The court did agree to the school superintendent's proposal modifying feeder schools at the senior high school level which reduced the need for busing.

In March, 1982, the school board submitted another plan to the district court for desegregation of the middle schools. The district court held that, although the plan did not more effectively desegregate the school system than the court's plan, it would achieve a satisfactory level of desegregation.[339] The court viewed the plan as a "historic" breakthrough noting, "for the first time the Board has adopted a proposal which comes near to actually desegregating a substantial portion of the school system."[340] The court reaffirmed its position that it had no commitment to any particular desegregation plan but merely was committed to the elimination of all vestiges of racial segregation in the school system. The court accepted the plan with a few modifications, hoping that those implementing their own plan would be more likely to look for ways to make it work than for ways to make it not work. One modification dealt with the proposed use of Oriental students as "white" students in the calculation of racial composition of a middle school. The appeals court said they could not be utilized for this purpose.

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[333] *Id.* at 136.

[334] Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978).

[335] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[336] Tasby, *supra*, note 332 at 138.

[337] Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1982).

[338] Davis v. East Baton Rouge Parish School Bd., 533 F. Supp. 1161 (M.D. La. 1982).

[339] Davis v. East Baton Rouge Parish School Bd., 541 F. Supp. 1048 (M.D. La. 1982).

[340] *Id.* at 1051.

The litigation involving desegregation in Jackson, Mississippi, which began in 1963 has come to an end, as a district court dismissed the suit from its docket.[341] The court cited the lengthy history of the desegregation effort and used six criteria set forth by the United States Supreme Court in *Green v. County School Board of New Kent County*[342] to determine if the school system was still dual-race or unitary. The Jackson School District was found to be fully integrated in all six—faculty, staff, transportation, extracurricular activity, facilities, and composition of student body—thus achieving unitary status. The court said that the school district had been unitary since 1971 and had complied with all desegregation directives and orders. The court then concluded that it had no further constitutional function to perform in the case.

Two Georgia cases were decided last year. Although a desegregation case involving Walton County was never certified as a class action suit, the Fifth Circuit ruled it had been treated as such originally by the district court.[343] The court held that additional members of the class could therefore be substituted as plaintiffs to prevent the action from becoming moot. The court affirmed a district court's order refusing to amend its original desegregation decree which made use of mandatory attendance zones. Using an earlier Fifth Circuit case for guidance,[344] the court also held that parents in Walton County should be allowed to intervene in the desegregation action.

In Baldwin County, a district court ruled that a decrease in the number of black teachers from forty percent to thirty-two percent did not establish the fact that the board of eduction had frustrated the goal of a unitary school system.[345] The appellants provided no evidence that the change had resulted from discriminatory board practices, and the court said that the board was not required to maintain the same black-white teacher ratios permanently. The court also refused to allow parents to intervene on behalf of the black teachers because they had failed to produce more than a minimal amount of evidence in the eight

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341. Singleton v. Jackson Mun. Sep. School Dist., 541 F. Supp. 904 (S.D. Miss. 1981).
342. 391 U.S. 430 (1968).
343. Graves v. Walton Cty. Bd. of Educ., 686 F.2d 1135 (5th Cir. 1982).
344. Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973).
345. United States v. Baldwin Cty. Bd. of Educ., 544 F. Supp. 367 (M.D. Ga. 1982).

months they had been given to prepare. It was the court's opinion that the United States would continue to be the best representative of parents, teachers and students of the school system.

Desegregation of the public schools in the Parish of Pointe Coupee, Louisiana, was again before the district court.[346] After the Fifth Circuit remanded the case for further proceedings in 1974,[347] the school board failed to advance any plans for further school desegregation. In 1980, the United States filed for supplemental relief. After negotiations between the original plaintiffs, the federal government, and the school board, a consent decree for complete desegregation of the school system was filed in the fall of 1981. At the time of the hearing on the decree in 1982, the plaintiffs presented written objections to portions of the plan. The district court said that it was the "current law of the Fifth Circuit that a district court is required to approve a consent decree which the parties have agreed upon, unless it contains provisions which are unreasonable, illegal, unconstitutional or against public policy."[348] Accordingly the court said it had to approve the portions of the decree to which there was complete agreement. After looking at the objections of the plaintiffs, the testimony of the school superintendent, and the consent decree as a whole, the court concluded that it would not impair the constitutional rights of the plaintiffs and would achieve their interest in the desegregation of the school system. Looking favorably upon the school board's support of the plan and its willingness to comply with constitutional mandates, the court approved the consent decree in its entirety.

In a similar situation, the Fifth Circuit approved implementation of stipulations agreed to by the federal government and the Port Arthur Independent School District.[349] In 1980, the federal government had filed a motion in district court requesting that the district be ordered to develop plans fully to desegregate its schools in compliance with the requirement of earlier court-ordered desegregation. The school district said there was no need for a court order and requested that it be allowed to implement desegregation modifications proposed by a multiracial citizens' advisory committee. The district court entered an order ruling that the school district had made a good faith effort to comply with desegregation orders and approved the new modifications. The government appea[illegible][350] The parties reached a negotiated agreement

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346. Boyd v. Pointe Coupee Parish School Bd., 534 F. Supp. 555 (M.D. La. 1982).
347. Boyd v. Pointe Coupee Parish School Bd., 505 F.2d 632 (5th Cir. 1974).
348. Boyd, *supra*, note 346 at 556-57.
349. United States v. Texas Educ. Agency, 679 F.2d 1104 (5th Cir. 1982).
350. *Id.*

and submitted a brief to the Fifth Circuit outlining the desegregation plan. The Fifth Circuit approved and remanded the case to the district court for implementation as requested by the parties.

4.9f State Courts

The Supreme Court of California upheld a desegregation plan developed by the Oxnard, California, board for its high schools.[351] The court held that it was proper to use five criteria listed in the board of education's regulations to determine which schools were segregated. Plaintiffs had argued that the board had incorrently determined which schools were segregated because it had not used specific numerical criteria. The court also held that the use of a multiracial advisory committee composed of parents, teachers, principals, administrators, and students had satisfied the requirement to assess community attitudes as to which schools were segregated. The advisory committee and public hearings were also sufficient to satisfy the board of education regulation requiring community involvement, according to the court. The court held that adequate notice of the public hearings had been given through the local newspapers and a notice sent to parents of all students currently attending high schools in the system.

Two cases involving desegregation came before Pennsylvania courts. The Pennsylvania Human Relations Committee asked a court to force Philadelphia to submit a new desegregation plan containing mandatory elements.[352] In response, the court ruled that a substantial number of racially identifiable schools had been unaffected by the school system's voluntary desegregation program. The court noted, however, that the desegregation program had educational merit, that it had resulted in the desegregation of some schools, and that significant additional gains were likely if the district remained committed to the plan. The court held that comprehensive desegregation could be best effected through modification of the school district's voluntary plan.

The Pittsburgh Board of Public Education petitioned an appeals court for an evidentiary hearing to establish its compliance with court-ordered desegregation.[353] The Pennsylvania Human Relations Committee then filed to have the board held in contempt for noncompliance with the orders. The court held that the board should not e held in contempt because it had made a good-faith effort by implementing a substantial compulsory desegregation plan, which esulted in full compliance in the middle schools and progress at other evels. The court ruled that this plan should be maintained and further odified to achieve full compliance with court-ordered desegregation.

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[351] McKinny v. Oxnard Union High School Dist., 181 Cal. Rptr. 549 (Cal. 1982).

[352] Pennsylvania Human Rels. Comm'n v. School Dist. of Philadelphia, 443 A.2d 1343 (Pa. Commw. Ct. 1982).

[353] Pennsylvania Human Rels. Comm'n v. Board of Pub. Educ. of School Dist. of Pittsburgh, 444 A.2d 792 (Pa. Commw. Ct. 1982).

5

TORTS

Paul W. Thurston

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5.0 INTRODUCTION

Torts is a general term used to define several independent civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or reputation. The word "tort," derived from the Latin word "tortus" meaning "twisted," was at one time common in English as a general synonym for "wrong."[1] The general sense of tort as wrong suggests the difficulty involved in providing a precise definition. According to Prosser torts is "a body of law which is directed toward the compensation of individuals rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required.[2]

Torts are actually separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe one another. The more common torts have developed historically and have been recognized for centuries. Examples of these range from negligence to assault and battery to libel and slander. But tort law is not static. As society changes, it is possible for courts to define new legal responsibilities between individuals. Educational malpractice and constitutional torts represent two such emerging areas in school law.

This chapter will report the cases that have been reported during 1982 involving some type of tort claim within the school context. The cases are organized according to the particular type of tort involved. The categorization system employed will follow basically the format used in recent volumes of *The Yearbook of School Law*.

5.1 NEGLIGENCE

Negligence is the most common tort. In the lay person's mind negligence describes a type of conduct. But in a legal sense, for an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum,[3] four elements.[4] Schools and their employees are not responsible as insurers for any and all injuries that occur. For liability to be present it must be shown that the school owes a particular duty to the injured person(s), that the behavior fell short of that required, that this breach was the proximate cause of the injury, that there were real injuries, and that the plaintiff was not responsible for causing the injury. Let us briefly consider the first four elements that make up the prima facie case:

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[1] W. Prosser, Handbook on The Law of Torts (4th ed. 1971).

[2] *Id.* at 6.

[3] The exact elements necessary for carrying the plaintiff's burden in the prima facie case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not.

[4] *See* Prosser, note 1, *supra*, for a more detailed description of elements of the prima facie case.

1. *Duty of Due Care.* There is a duty of due care that the law recognizes one person owes to another. It requires a certain standard of conduct for the protection of others against unreasonable risks. One has a legal duty to act as an ordinary, prudent, reasonable person in the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence, and experience.

The duty can be specified by statute or as a matter of common law. Usually in the school context, it is not hard to show that the school (and its teachers) have a duty to protect the health and safety of the students while they are in the custody of the school.[5]

2. *A Breach of the Duty.* This amounts to a failure of one party to conform to the standard required toward another. This can occur either from an action or an omission. The breach of the duty of due care in a specific case is a question of fact. Making a showing of this breach involves both a showing of what actually happened and showing from these facts how the defendant acted unreasonably. Alleging failure to supervise, for example, is alleging that the teacher omitted or failed to take the appropriate action.

3. *Causation.* There needs to be reasonably close causal connection between the alleged misconduct and the resulting injury. This involves both a cause in fact relationship between the behavior and injury as well as the behavior and injury being sufficiently close in time and foreseeability.

4. *Actual Damages.* The plaintiff must show an actual loss or real damages. Nominal damages, to indicate a technical right, or the threat of future harm, not yet realized, are insufficient injury on which to bring a negligence action. Damages awarded depend upon the particular person injured.

There are two other components of the prima facie case that are basic to understanding its operation: foreseeability and the reasonable person standard. Foreseeability, which is either subsumed under the duty of due care element or the proximate cause element, means that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. This does not mean that the defendant subjectively or personally actually foresaw the potential danger. Rather, the defendant is presumed to be a reasonable person and the jury then is given instructions like the following to determine foreseeability: "Would you, as a reasonable person, standing in the place of *Y* defendant at *X* time, have foreseen the occurrence of *Z* injury?" Notice that under this instruction the jury enjoys the luxury of hindsight when determining foreseeability, something which often leads to sharper vision than the defendant actually may have had. A recent Florida Supreme Court decision, in an appeal of a case reported last year,[6] is instructive in showing the application of several of these elements[7]

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[5] For an elaboration of the implications of the *Larson* case, described in THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) at 237, *see* Hooker, *Court Restores Principals As Instructional Supervisors*, 1 WEST'S EDUC. L. REP. 1 (1982).

A high school student was very seriously injured in a 1975 hazing incident conducted off school grounds by a school-sanctioned fraternity. Because of the club's bad reputation prior to this incident it was required by school board regulations to obtain approval from the principal for extracurricular outings and was prohibited from conducting hazings. In addition, a faculty advisor was required to be present at all meetings. The club held two meetings, the second of which was the hazing where the student was seriously injured, and the faculty advisor was absent from both. The student and his father then brought a negligence action against the board and its agents, against the principal and teacher individually both for their negligence and for their gross and reckless negligence. The analysis of the Florida Supreme Court in these allegations is instructive in many of the major elements in negligence.[8]

In assessing the negligence of the defendants the court had to determine whether a duty of due care existed between the defendants and the injured student. This is complicated here because the injury did not occur during the day or on school premises. There are two approaches to find such a duty. One is to determine whether the board and its employees have authority to control student behavior, and a duty then follows. In these facts such a duty existed because of school board regulations and state statutes specifically providing such authority. A second approach, more pragmatic, is to assess the interests of each party and society to determine whether a duty should be imposed. Under this approach, once again with the statutes and school board regulations, the court holds the responsibility for supervising such activities is reasonably imposed upon school authorities.

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[6] THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 185, 193.

[7] Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982).

[8] The Florida Supreme Court held that a 1980 statute which relieved all state officers, employees and agents from personal liability for their negligence acts and made retroactive to all suits pending as of June 30, 1980, violated the due process of those injured persons and was unconstitutional. The court articulated the rule that a public officer is answerable to private persons who sustain special damage resulting from the negligent performance of the officer's imperative or ministerial duties, unless the wrong done is a violation of a duty which he owes solely to the public. The student's serious injury provides the special damages while the failure of the teacher to supervise the club, particularly when directed to do so by the board, was ministerial in nature.

The court next had to analyze whether the breach of this duty was the proximate cause of the student's injury. The pivotal issue in this proximate cause case was whether the injury was foreseeable. Does the student behavior which caused the injury act as an intervening cause and thereby release those supervisors from liability or is the student behavior foreseeable? The Florida Supreme Court employs the general rule that certain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve the principals or teachers from liability for failure to supervise. Because of the past performance of this fraternity the student behavior was foreseeable. In fact, the school had even anticipated its misbehavior by requiring its supervision.

The Florida Supreme Court rejected the action for willful and wanton negligence against the principal and teacher. For exemplary damages to be recovered the complaint must allege facts and circumstances of fraud, malice, gross negligence, or oppression. Gross negligence must be established by facts evidencing a reckless disregard of human life or rights which is equivalent to an intentional act or a conscious indifference for the consequences of an act. Because the facts here do not support an imputation of intent or conscious indifference there is no basis for willful and wanton negligence.

The application of these legal standards depends on the particular set of facts involved. The jury usually plays the central role as fact finder for all the elements of the prima facie case. Still, the judge controls, as a matter of law, which cases involve factual allegations sufficient to go to the jury. All the cases in this chapter involve questions of law. Presumably a much greater number of cases involving school negligence that are heard at the trial court level are decided by the jury and not appealed. These cases are not reported in any systematic way and are not reported in this chapter.

Torts, generally, and negligence, more so than other torts, are strictly a matter of state law. And, it is important to note at the outset, there is considerable variation between states in many areas of negligence law, particularly in the appropriate standard to be used for liability and the existence of immunity, to mention just two. This variation suggests that readers need to be cautious in applying a case decided in one state to another state. Extreme caution is appropriate when thinking about the precedential value of one case to another state. It is, of course, possible for a case to have precedent to another state if the same mode of analysis is applied. Determination of the existence of a duty of due care in a particular situation will often have transferability from one state to another, for example. But because of the diversity between states, both as to their statutes and earlier judicial decisions, caution is advised. It is quite possible, for example, to take the same fact situation and get quite different results in two different states because of different standards being applied.

5.1a Student Injuries

Schools have a duty to protect the health and safety of students while they are in their charge. Consequently, when students are injured it is common to inquire whether the injury is due to a breach of this duty by a school employee. There is also a strong financial incentive to bring an action against a teacher or a school district because of the availability of money to pay the damages. Since the circumstances will determine the liability and because the circumstances vary widely, it is instructive to look at the following cases reported in the past year that involved student injures. The cases are organized in general categories according to the location of the injury.

5.1a(1) School Settings During School Hours[9]

A first grade student was injured when a classmate shut a heavy metal door on the child's thumb. The father of the child brought an action against the district seeking damages for the injury on the grounds that the door was unreasonably hazardous and that the school was negligent in not properly supervising the children. The Lousiana appellate court affirmed the trial court in dismissing the suit on both grounds.[10] Insufficient evidence was presented to support the claim that the district is strictly liable for injuries caused by metal doors. In addition, the court could find no basis for the alleged improper superivision. There is no requirement for constant supervision, and because metal doors are not in themselves a dangerous condition, there is no showing of the unreasonableness of the supervision.

A high school student was injured in art class when she fell to the floor after another student had knocked the stool upon which she was sitting out from underneath her. The Ohio appellate court rejected claims of negligence against both the principal and teacher.[11] First, the teacher could not have foreseen that one student would do this to another student. Second, there was nothing to suggest that the stools were in any way inherently unsafe in their design or construction.

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[9] For articles that deal with specific types of duties owed in the school setting *see* Note, *School Liability for Athletic Injuries: Duty, Causation and Defense*, 21 WASHBURN L.J. 315-41 (1982) and Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J. L. & EDUC. 479-505 (1982).

[10] Narcisse v. Continental Ins. Co., 419 So. 2d 436 (La. Ct. App. 1982).

[11] Boyer v. Jablonski, 435 N.E.2d 436 (Ohio Ct. App. 1980).

A second grade student in a parochial elementary school was badly burned when she, dressed in a bluebird costume for a school play, came into contact with a lighted candle on the teacher's desk. The candle was lit in May as part of the morning prayer to honor the Mother of Jesus. The Missouri court of appeals affirmed the trial court and the jury's award of $1,250,000 for physical and emotional damages.[12] The lighted candle posed a danger, and the teacher failed to exercise reasonable care in protecting the second grade children from it. The court rejected a claim that the jury award was excessive. The case is instructive on the reluctance of an appellate court to reverse the jury on the matter of damages, and the decision details the physical pain and psychic trauma which the girl experienced that provided the basis for such a large jury award.

An eleven-year-old sixth grade student broke a permanent front tooth in P.E. class when she hit her mouth against the wall while performing a required exercise known as the vertical jump. The Indiana appellate court reversed the trial court's entering a judgment on the evidence for the defendant school district at the conclusion of the plaintiff's case.[13] The appellate court was persuaded that, examining the evidence in light most favorable to the plaintiff, there was sufficient testimony for a jury to find that the instruction given by the P.E. teacher did provide a risk to the students and that these instructions were the proximate cause of the student injury. The case was remanded for further proceedings.

Injuries in shop classes are a common source of negligence actions against school districts and teachers. Three such cases were reported in 1982.

A Pennsylvania superior court affirmed a trial court decision which awarded $95,000 to a student who had lost a finger in a wood shop class when cut by a saw that did not have a guard.[14] The court was satisfied that sufficient evidence had been presented to support the finding that the high school principal was negligent in not correcting a dangerous situation created by absence of a guard on the circular saw. Additionally, the court was satisfied that the testimony of two expert witnesses was sufficient basis for the $95,000 award returned by the jury.

An allegation that a student injury in a shop room accident resulted from failure to supervise the area properly because of absence of teacher at the beginning of the period was sufficient to show a breach of duty by ie school district.[15] There is a responsibility of the school to protect the ealth and safety of the students in its charge, and this duty encompasses negligent failure to act.

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[12] Smith v. Archbishop of St. Louis, 632 S.E.2d 516 (Mo. Ct. App. 1982).

[13] Dibortolo v. Metropolitan School Dist. of Washington Twp., 440 N.E.2d 506 (Ind. Ct. App. 1982).

[14] McKnight v. City of Philadelphia, 445 A.2d 778 (Pa. Super. Ct. 1982).

A fourteen-year-old student in an agriculture class where instruction welding was being given was badly injured by a power saw. The saw as stored in the back of the classroom and was used by the student dur- g the class period without authority and at a time when the instructor as absent from the room. The Louisiana appellate court affirmed the ial court in holding the school board liable for having breached its duty protect the health and safety of its students by allowing such a angerous instrumentality to be stored in the back of a classroom in a ondition where it could be so easily used.[16] The teacher was negligent r not properly supervising the classroom, and the school board sumed his liability under the respondeat superior doctrine. The trial ourt award of $70,000 against the school board was sustained.

1a(2) En Route to and from School

Schools have some responsibility for the safe movement of students to nd from school. The precise extent of this responsibility depends on hether busing is involved and the nature of the risk in coming to or go- g from school. A number of cases were decided in this area last year.

A seventeen-year-old educable mentally retarded youngster with a ental age of seven or eight was one of eleven boys who played on the hool's Special Olympics basketball team. Since the school had no in- oor gymnasium the teachers took them to practice at a nearby facility having the students walk the three block distance in an area of eavy vehicular traffic. Only one teacher was supervising this first trip etween the schools, during which one student dashed impulsively into ie street against the light and was killed. A wrongful death action was rought against the school and the teachers for negligently supervising iese students. The Louisiana appellate court affirmed the trial court ecision in holding that the teachers had a duty of due care to provide n adequate number of supervisors to accompany the team between ie school and the gym several blocks away and a duty to choose the fest route possible.[17] In addition, the court held that such an action as foreseeable. And finally, the conduct of the teachers amounted to a reach of their duty in supervising these students.

A junior high student was struck by a car and badly injured while ossing a street after participating in extracurricular activities at the school. The Illinois appellate court affirmed dismissal of the suit because the plaintiff could not show any duty the village had to provide a crossing guard for school children at street intersections or any duty on the school district to provide bus service home to those participating in extracurricular activities.[18]

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[15] Ankers v. District School Bd. of Pasco Cty., 406 So. 2d 72 (Fla. Dist. Ct. App. 1981).

[16] Lawrence v. Grant Parish School Bd., 409 So. 2d 1316 (La. Ct. App. 1982).

[17] Foster v. Houston General Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981).

In New York, a tenth grade student who was enrolled in a vocational training program at another building got into an automobile accident in which several persons were badly injured while he was driving between the schools. The student was legally licensed and driving his own car, although driving it in violation of school rules. The injured plaintiffs alleged that the school district and vocational center failed to meet their duties of due care by failure to enforce the school rules more vigilantly even when they knew that the no-driving rule was being violated. The supreme court, appellate division, upheld the trial court in dismissing the actions against the school and vocational center.[19] The standard of care applicable to a school's supervision of its students is the same degree of supervision which a parent of ordinary prudence would undertake in comparable circumstances. Yet a parent who negligently supervises his child is not liable for the child's tortious conduct unless the parent entrusts a dangerous instrument to the child. Because the school did not have specific knowledge that this student was a reckless driver the school has not breached any duty of due care owed to citizens who were injured in the automobile accident. The court used the lack of foreseeability to cut off any liability the school might have. "It would be extending the legal consequences of wrongs beyond a controllable degree to hold that use of an automobile by a licensed operator under these circumstances constitutes an unreasonable risk to others for which these schools may be liable."[20]

A school bus with a record of mechanical difficulties stalled along a four lane highway. The bus was on its way to school and was partially loaded with children. A nine-year-old accompanied a ten- or eleven-year-old youngster across the highway to make a phone call to the school. On the way back across the highway the two children got separated and the nine-year-old was hit by a car as she stepped off the median. The North Carolina appellate court reversed the trial court's summary judgment for the defendant saying that these facts clearly presented evidence sufficient to go to trial on whether a duty of care owed to the child by the bus company had been breached and whether the bus company's negligence was a proximate cause of the injuries.[21] The bus company argued that the negligence of the driver of the car that struck the child insulated the bus company from liability. The appellate court rejected this on the basis that the settlement from the car's owner did not include an admission of negligence and the fundamental principle of negligence law is that the original negligence is not excused by subsequent negligence if that subsequent negligence was foreseeable. And this is a matter for the jury to decide.

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[18] Plesnicar v. Kovach, 430 N.E.2d 648 (Ill. App. Ct. 1981).

[19] Thompson v. Ange, 443 N.Y. Supp. 2d 918 (N.Y. App. Div. 1981).

[20] *Id.* at 921.

A minor was hit by a car while disembarking from a bus while returning home from school. The bus was operated by the Atlanta Rapid Transit Authority and was not marked as a school bus. A central issue is whether the bus was actually a school bus for purposes of satisfying state law which would require special markings and special safety procedures for boarding and unboarding of children. The Georgia appellate court affirmed the trial court in holding that this bus was a school bus—it carried only students and stopped at locations designated by a member of the safety patrol although other passengers could board the bus.[22] The court affirmed the summary judgment that the failure of the bus to be appropriately marked amounted to negligence per se. Both elements of a duty of due care and breach of duty were satisfied.

A new trial was ordered for the purpose of apportioning liability between the bus company, driver and possible contributory negligence of the child. It was an error to instruct the jury that it would be authorized to find that the child's being struck was not a foreseeable consequence of the violation of the state bus marking requirement and that the bus company was not therefore negligent as to the child and could not be given at the new trial.

A Louisiana appellate court upheld a finding that bus driver was negligent in hitting a girl, even though she darted back into the line of the bus afer provisions had been made to alter the original path of the bus.[23] Because the trial court judge abused his discretion in awarding $450,000 to the injured child's father the judgment was reduced to $200,000.

A nine-year-old student was very seriously injured when struck by a car while waiting at the bus stop for a school bus. The Oklahoma appellate court reversed a lower court decision which had granted a demurrer to the action, and held that the school district has a duty to provide a reasonably safe bus stop where children may wait for the bus with reasonable safety, having due regard for their age, immaturity and inexperience.[24] The matter was remanded to trial to determine if the duty was breached.

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[21] Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).

[22] Metropolitan Atlanta Rapid Transit v. Tuck, 292 S.E.2d 878 (Ga. Ct. App. 1982).

[23] Minton v. St. Bernard Parish School Bd., 416 So. 2d 167 (La. Ct. App. 1982).

A school bus driver was driving an automobile owned by the district from her home to the bus barn where she would pick up her bus and deliver children homeward. During this trip to the bus barn she stopped to conduct some personal business and was struck by a motorcyclist as she made a left hand turn. The Idaho Supreme Court held that the school district did not have any liability for the injury separate from that imputed to it by the driver's negligence.[25] The court also refused to apply safety rules, which were designed to control operation of vehicles by employees in transporting pupils, as the standard for the duty of due care when a district driver in a district car area involved in an accident when there is no pupil transportation involved.

5.1b Nonstudent Injuries

School districts have a duty of reasonable care to teachers and other adults. There were two cases reported in this area during 1982.

A thirteen-year-old eighth grade girl had intentionally pulled the chair out from underneath the unsuspecting teacher who fell to the floor and injured her back. The student testified she intended to pull the chair but did not intend to injure the teacher. At the trial the jury had been instructed that if they found there had been offensive touching with an intent to cause harm it is battery and they must find for the defendant since this is not an action in negligence. On appeal the Maryland court agreed generally with the injured teacher that these facts could be the basis of both a negligence action and an assault and battery action.[26] The presence of intent to do an act does not preclude negligence. The appellate court cited Prosser's quote from the Restatement of Torts on this point:

> Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such precaution that under the circumstances he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. In determining whether his conduct will subject the interests of another to an unreasonable risk of harm, a person is required to take into account such of the surrounding circumstances as

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[24] Brooks v. Woods, 640 P.2d 1000 (Okla. Ct. App. 1981).

[25] Quincy v. Joint School Dist. No. 41, 640 P.2d 304 (Idaho 1982).

[26] Ghassemieh v. Schafer, 447 A.2d 84 (Md. Ct. Spec. App. 1982).

> would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by an ordinarily reasonable person and to use such judgment and discretion as is exercised by persons of reasonable intelligence under the same or similar circumstances.[27]

In this case the intentional act of pulling out the chair could have the nintended consequence of injuring the teacher—negligence. But since he plaintiff did not seek a specific instruction on negligence at the trial ourt which focused on the duty owed and the breach of duty that esulted from such intentional action the plaintiff was barred from aising the matter on appeal.

A high school coach in Louisiana was injured at construction site at he high school, and the trial court found negligence against the lumbing contractor. Two grounds for appeal of the verdict were nade.[28] First, the appellate court denied an appeal of the exclusion of a emedy for neck injury because there was not sufficient evidence to upport such a finding. Second, the appellate court reversed the lamages award for future medical expenses because insufficient vidence of such expenses was presented.

5.2 EDUCATIONAL MALPRACTICE

Educational malpractice is a negligence claim that has received considerable public attention. The theory behind educational malpractice, imply put, is to place a duty on the school to provide that standard of ducation appropriate for the grade level of the particular child. It is a opular topic with legal commentators[29] though to date it has not fared vell in the courts.

In a suit seeking monetary damages for alleged improper placement, esting and supervision of a child, the Maryland Court of Appeals efused to recognize an educational malpractice claim that could result n money damages.[30] The court thought other remedies were available and did not want to put the judiciary in the position of overseeing the day-to-day operation of the schools. The court did allow the plaintiff to continue on the theory that individual educators can be liable for the intentional torts they commit in the educational context. "It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery."[31]

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[27] W. PROSSER, HANDBOOK ON THE LAW OF TORTS at 207, n.12 (4th ed. 1971).

[28] Stewart v. Hanover Ins. Co., 416 So. 2d 286 (La. Ct. App. 1982).

[29] Note, *Educational Malpractice*, 4 GEORGE MASON U. L. REV. 261-83 (1981); Note, *'orts—School Board's Placement of Student with Average Intelligence into Classes for the Ientally Retarded, Along with 12 Years Failure to Retest, Not Actionable under Iegligence Principles*, 10 HOFSTRA L. REV. 279-309 (1981); Funston, *Educational Ialpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743-813 1981); Note, *Educational Malpractice and a Right to Education: Should Compulsory :ducation Laws Require a Quid Pro Quo?*, 21 WASHBURN L. J. 555-79 (1982); Note, *:ducational Malpractice: D.S.W. v. Fairbanks North Star Borough School District (628 '.2d 554, Alaska)*, 11 UCLA-ALASKA L. REV. 111-18 (1981).

[30] Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982).

In Pennsylvania a senior failed health education class and was not graduated until she successfully completed a make-up course during the summer. The girls' parents sought money damages alleging that the district's actions amounted to a gross violation of public policy. The court disagreed and treated the matter basically as one of educational malpractice; and not being able to find any manifest illegal action on the part of the district, dismissed the complaint.[32] The Eighth Circuit Court of Appeals refused to treat a section 504 (1973 Rehabilitation Act) claim as a basis for educational malpractice.[33]

5.3 NEGLIGENCE DEFENSES

Even if the injured plaintiff can satisfy the prima facie case, the defendant teacher or school district or administrator still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses to the introduction of a different standard of liability. The reader should be alert to the divergent motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

5.3a Immunity

5.3a(1) Common Law (Governmental) Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state.

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[31] *Id.* at 589.

[32] Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (Pa. Commw. Ct. 1981).

[33] Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982).

Sovereign immunity has eroded to a great extent—though it still exists in several states. In many states the courts have abolished sovereign immunity or the legislatures have abolished it or passed some substitute form of statutory immunity.[34] Numerous cases reported in 1982 involved one of these immunity defenses.

The Virginia Supreme Court affirmed trial court dismissal of a negligence suit against principal and superintendent which claimed that stabbing of one student by another student was proximately caused by administrator's failure to provide a safe environment.[35] As both administrative positions require significant amounts of discretional and management functions in the school, they are insulated from liability by sovereign immunity.

An eleven-year-old child was struck by an automobile while enroute to catch a school bus at the bus stop. The child's estate brought a wrongful death action against the school district for negligently locating the school bus stop on one street rather than another and negligently failing to post warning signs to passing motorists of the bus stop location. The Florida appellate court affirmed the trial court decision that this action was barred by soveriegn immunity.[36] Discretionary governmental functions enjoy sovereign immunity while operational functions do not. Since the decisions as to placement of the bus stop location and as to placement of warning signs involved policy making, planning or judgmental government functions, there was discretion involved and sovereign immunity applies.

A high school student struck in the eye by a nail during vocational agriculture class brought action against the board of education and the superintendent, principal and teacher for negligence. The Missouri Supreme Court, elaborating upon its recent holding on sovereign immunity,[37] held that sovereign immunity barred suit against the board of education.[38] Yet sovereign immunity does not apply to individuals who may have acted outside the scope of their official duty; and consequently the pleadings can be amended to allow specific factual allegations of individual wrongdoing by the administrators which resulted in the injury. Finally, the court affirmed its earlier decision that the existence of liability insurance does not act as a waiver of the sovereign immunity defense.

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[34] Note, *Sovereign Immunity—Discretionary Function Exemption to the Tort Claims Act: Larson v. Independent School District No. 314, 289 N.W.2d 112 (Minn.)*, 5 HAMLINE L. REV. 103-21 (1982); Note, *Torts—Government Immunity Under the New Mexico Tort Claims Act*, 11 N.M.L. REV. 475-85 (1981).

[35] Banks v. Sellers, 294 S.E.2d 862 (Va. 1982).

[36] Harrison v. Escambia Cty. School Bd., 419 So. 2d 640 (Fla. Dist. Ct. 1982).

[37] Spearman v. University City Pub. School Dist., 617 S.W.2d 68 (Mo. 1981).

[38] Lehman v. Wansing, 624 S.W.2d 1 (Mo. 1981).

Two cases were decided by Missouri appellate courts.[39] A photographer injured at football game by players crashing into him just out of bounds on the sideline was barred from recovery by statutory sovereign immunity. The statute, which permits tort claims only for injuries arising from a public employee's operation of a motor vehicle or the condition of public entity's property, was challenged for violating the equal protection clause of both the federal and state constitutions. The Missouri Supreme Court held that the classifications are reasonable because they allow for the protection of certain state resources while allowing for recovery in certain specified areas.[40] The statutory classifications are rationally related to the statute's objectives, and are therefore constitutional.

In two short opinions the West Virginia Supreme Court of Appeals, in reversing the trial court decisions, reiterated its interpretation that local boards of education do not have state constitutional immunity nor common law governmental immunity from suit.[41]

5.3a(2) Statutory Immunity

There are a variety of ways in which a statute can limit liability of a school district. One is to put a monetary limit on the maximum claim that a successful plaintiff can recover. Another way is to provide governmental immunity generally with specific statutory exceptions allowed.

In Pennsylvania a sixth grade student was severely injured when struck in the eye by a pencil thrown by another student at a time when the teacher was absent and the classroom was unsupervised. The court rejected the plaintiff's claim that the use of the pencil to cause the injury amounted to personal property, one of the exemptions to sovereign immunity, because the real underlying claim was negligent supervision.[42] The court also upheld the sovereign immunity statute from claims of its violating both the federal and state constitutions.

A wrongful death action brought against the district for alleged negligence for improperly supervising the study hall where a student was stabbed to death was barred by the Pennsylvania Tort Claims Act.

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[39] Allen v. Salina Broadcasting, 630 S.W.2d 225 (Mo. Ct. App. 1982) (Consideration of whether school district's operation of a radio station is a governmental function or a proprietary function was remanded.); Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982) (Actions of bus driver not protected by sovereign immunity because they are ministerial. "Operation of motor vehicle" exception did not apply to the facts of the case.).

[40] Winston v. Reorganized School Dist. R-2, 636 S.W.2d 324 (Mo. 1982).

[41] King v. Wayne Cty. Bd. of Educ., 296 S.E.2d 351 (W. Va. 1982); Smith v. Board of Educ. of Cty. of Kanawaha, 394 S.E. 2d 469 (W. Va. 1982).

[42] Robson v. Penn Hills School Dist., 437 A.2d 1273 (Pa. Commw. Ct. 1981).

The commonwealth court rejected an argument that this fit under the statutory exceptions dealing with the care, custody or control of real property.[43]

A Pennsylvania school district had been appointed trustee of a public library. When a person was injured at the library and brought suit against it, the school district sought dismissal of the action arguing that because of the agency relationship the library enjoyed immunity under the state tort claims act. The federal district court disagreed, holding that the trust relationship was not an agency relationship, that the two operations were separate for tax purposes and that the library was not a governmental agency within the meaning of the tort immunity statute.[44]

A swing broke during school hours and the ten-year-old girl swinging on it suffered a fractured left leg. The Texas appellate court affirmed a dismissal of the suit on the grounds that the furnishing of swings for use of school children during school hours is a governmental function and, therefore, the district is protected by the doctrine of governmental immunity. The court refused to abrogate the doctrine and upheld its constitutionality.[45]

A third way to limit liability is to make the employee liable only for willful and wanton misconduct. A recent Illinois case involved such a matter. A child fell from a swing on the school playground and sued the district for injuries sustained. The appellate court affirmed the trial court dismissal of the action for failure to allege willful and wanton misconduct on the part of the school, necessary elements under the tort immunity act.[46] The court also rejected an alternate theory that this was liability under attractive nuisance. Because the attractive nuisance doctrine applies to indicate the presence of a child at a dangerous location and therefore the duty of care owed to an uninvited child is irrelevant to the present situation as the immunity statute precisely states the duty of care owed to children on public playgrounds.

The uncertainty over the precise scope of Michigan's sovereign immunity defense in the public school context continues.[47] In a case involving alleged repeated, slanderous remarks and assaults and batteries by a teacher against a student the appellate court held the school district could not be liable for its alleged negligence in hiring and supervising the teacher because of the doctrine of governmental potentially liable, though, on a respondeat superior theory, and the matter needs to be remanded to make a factual determination of this claim. To prevail on this respondeat superior claim the injured student must prove that unprovoked and unjustified verbal or physical assaults were used by the teacher and that the student believed the use of this force was within the scope of the teacher's employment.

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[43] Close v. Voorhees, 446 A.2d 728 (Pa. Commw. Ct. 1982).

[44] Bliss v. Allentown Pub. Library, 534 F. Supp. 356 (E.D. Pa. 1982).

[45] Duson v. Midland Cty. Indep. School Dist., 627 S.W.2d 428 (Tex. Ct. App. 1981).

[46] Jackson v. Board of Educ., 441 N.E.2d 120 (Ill. App. Ct. 1982).

[47] THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 198.

In analyzing whether governmental immunity exists there needs to be a showing that the incident occurred within the day-to-day operation of the school and that the activity out of which the injury arose must be examined and found to be a governmental function. Consequently, in a suit against a Michigan school district by an eighteen-year-old student who was injured in a power press accident on the employer's premises as part of a work experience program, the court held that because the purpose of this type of employment was remuneration and work experience with only a coincidental learning purpose the district did not enjoy governmental immunity.[49] The court withheld judgment on whether immunity would be lost if a student were injured on the job as part of a work study or cooperative program where learning was a large part of the assignment.

In another Michigan case, the appellate court, reversing the trial court, held that the school district as immune from liability for alleged negligent supervision when a vocational education student was injured at the job site.[50] The court held that the operation of a vocational education program is a governmental function, and therefore covered by the immunity statute, because such vocational education programs are an internal part of the curriculum of modern secondary schools. The public building exception to governmental immunity is not available because the injury occurred at the site of the employer.

Several other cases have been decided by Michigan appellate courts which applied immunity because the conduct falls under a governmental function and does not fit into one of the exceptions.[51]

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[48] Gaston v. Becker, 314 N.W.2d 728 (Mich. Ct. App. 1981).

[49] Bokano v. Wayne-Westland Commun. Schools, 318 N.W.2d 613 (Mich. Ct. App. 1982).

[50] Weaver v. Duff Norton Co., 320 N.W.2d 248 (Mich. Ct. App. 1982).

[51] Belmont v. Swieter, 319 N.W.2d 386 (Mich. Ct. App. 1982) (Injury to eighth grade student hit in eye by eraser thrown by another student while teacher was absent from classroom was barred by statutory immunity.); Cobb v. Fox, 317 N.W.2d 583 (Mich. Ct. App. 1982) (Maintenance and operation of a school bus system does constitute an immune governmental function.); Lewis v. Beecher School Sys., 324 N.W.2d 779 (Mich. Ct. App. 1982) (Wrestling coach acting within scope of his employment enjoys governmental immunity.); Lee v. School Dist. of City of Highland Park, 324 N.W.2d 632 (Mich. Ct. App. 1982) (Injury of four-year-old preschool student when ping pong table fell upon her could not be the basis of recovery because the operation of a school is a governmental function and the falling of the table was not the result of a dangerous or defective condition of the school building itself.).

When the Salt Lake City school district sought contribution from Salt Lake City as a codefendant in a negligence action where two five-year-olds were injured crossing a street on the way home from school the city argued that it was immune from suit under the Governmental Immunity Act provision that "no claim hereunder shall be brought by . . . any . . . governmental entity." The Utah Supreme Court rejected this argument, holding that the right to contribution under comparative negligence laws was not to be equated with the "claim" referred to in the Governmental Immunity Act.[52]

5.3b Other Defenses

5.3b(1) Assumption of Risk

In a previously mentioned case,[53] a high school boy was injured on a power saw stored in the back of an agriculature class. The district raised the defense of assumption of risk. The test for assumption of risk in Louisiana is articulated in the following way: "[T]he defense of assumption of risk is in fact quite narrowly confined and restricted by two requirements: first, that plaintiff must know and understand the risk he is incurring, and second, that this choice to incur it must be entirely free and voluntary."[54]

The court dismissed this affirmative defense because the injured student had never used a power saw before or been instructed in its use.[55]

5.3b(2) Contributory Negligence

In this same case where the fourteen-year-old boy was injured in an accident with a power saw the district alleged contributory negligence. Even though the district had told students not to use this equipment the court held that the act of the student switching on the saw did not amount to contributory negligence because this behavior was foreseeable.[56] The saw should not have been stored in the back of the classroom in an area so accessible to students.

Contributory negligence by a nine-year-old for not crossing a four-lane highway safely was alleged as one reason for granting a summary judgment to the defendant school bus company. The North Carolina appellate court reversed, citing the principle that there is a presumption that a nine-year-old child is incapable of contributory negligence.[57] Since no rebuttal evidence was presented a finding of contributory negligence was inappropriate.

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[52] Madsen v. Salt Lake City School Bd., 645 P.2d 658 (Utah 1982).

[53] *See* text accompanying note 16, *supra*, for a description of the case.

[54] Lawrence, *supra*, note 16 at 1321.

[55] *Id.*

[56] *Id.*

A twelve-year-old was injured when he fell through a pane glass window in the school corridor while racing another student during a break from P.E. class. The Louisiana Supreme Court reversed the appellate court on the question of the boy's contributory negligence.[58] Because the injured boy was engaged in a race in the hallway which was simply an extension of the races going on in the gym, and because he did not know that the window did not contain safety glass, the court concluded that they were acting as one would expect of the typical twelve-year-old of normal intelligence and experience.

5.3b(3) Statute of Limitations

Some states limit claims against school districts by placing a more restrictive statute of limitations on the initiation of a suit.

Two cases decided in 1982 involved determining the appropriate statute of limitations for claims filed under 42 U.S.C. § 1983. In one case a teacher alleged that his reassignment and dock in pay violated his federal civil rights. The school district, inter alia, argued that his failure to file his claim within the 120 days specified by the Oklahoma tort claims act barred suit. The Tenth Circuit held that this limitations period is not applicable to section 1983 claims because such short statute of limitations periods are inconsistent with the broad remedial purposes of the federal civil rights acts.[59]

Faced with a similar situation where a teacher alleged that he had been discharged illegally on the basis of his race, and the suit had been filed outside of the Louisiana one-year statute of limitations, the Fifth Circuit Court of Appeals held that federal courts apply the state statute of limitations governing analagous causes of action.[60] To do this the court must characterize the claim as it would be characterized under state law and then apply the appropriate state limitations period. In doing this the court characterized the racial discrimination claim under section 1983 as a tort (the right to be free from racial discrimination is independent of any contractual right) and therefore controlled by the one-year statute of limitations. Yet the due process violation claim made under section 1983 is based on property rights acquired through tenure, and is therefore a matter of contract which enjoys a three-year statute of limitations.

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[57] Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).

[58] Wilkinson v. Hartford Accident and Indem. Co., 411 So. 2d 22 (La. 1982).

[59] Childers v. Independent School Dist. No. 1 of Bryan Cty., 676 F.2d 1338 (10th Cir. 1982).

[60] Jones v. Orleans Parish School Bd., 679 (F.2d 32 (5th Cir. 1982).

On suggestion for rehearing the Fifth Circuit Court of Appeals withdrew a portion of its earlier opinion.[61] The court concluded that one-year statute of limitations applies to a claimed violation of due process in being dismissed for allegedly racial reasons rather than the three-year period which the court earlier suggested controlled in this contractual area.

5.3c Use of a Different Liability Standard

The reasonable care standard has been used as the mode of analysis in those circumstances in which immunity does not foreclose suit all together. Illinois employes a different standard—a willful and wanton misconduct standard—for alleged negligence in those situations in which a teacher has a supervisory relationship with students. Two recent articles elaborate upon developments in this willful and wanton misconduct standard.[62] And a Georgia case elaborates upon the relationship of sovereign immunity and willful and wanton misconduct. In this case parents brought a wrongful death action against school board members, the school district and many district administrators for the death of their daughter, an elementary school student, when a metal soccer goal fell and struck her as she knelt to tie her shoe during a physical education class. The appellate court held that all defendants should be granted summary judgment because they are protected by sovereign immunity.[63] Sovereign immunity applies to discretionary acts or omissions performed within one's official capacities and within one's scope of authority so long as not done without willfulness, malice or corruption. Even though the plaintiffs had amended the pleadings to claim willful and wanton misconduct the court found insufficient grounds to support this allegation. Willful and wanton is conduct "such as to evidence a willful intention to inflict the injury, or else was so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonnes equivalent in spirit to actual intent."[64] The court could find no factual basis for the necessary intent, actual or imputed, to prove willful and wanton misconduct. In addition, the court denied punitive damages cliams as not being available in a wrongful death action.

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[61] Jones v. Orleans Parish School Bd , 688 F.2d 342 (5th Cir. 1982).

[62] For elaboration of recent developments of the use of the willful and wanton misconduct standard in Illinois *see* Note, *Lynch v. Board of Education, [(Ill.) 412 N.E.2d 447]—Teacher's Apparent Authority Renders School District Liable for Negligence*, 34 DE PAUL L. REV. 220-41 (1981) and Siegel, *Recent Trends In School Tort Immunity*, 71 ILL. B.J. 240-6 (1982).

[63] Truelove v. Wilson, 285 S.E.2d 556 (Ga. Ct. App. 1981).

[64] *Id.* at 559.

5.4 LIABILITY INSURANCE

A student had been injured while waiting for a bus, and the jury stipulated damages of $190,000 of which twenty percent were allocated to the bus company and bus driver and eighty percent to the negligence of the school district, forty percent due to negligence in loading procedures and forty percent due to negligence in supervision of students. Declaratory judgment action was brought to determine liability of several insurance companies for coverage of the school district's liability. The Minnesota Supreme Court held that evidence that the insurance company would have insured school district had it been requested to do so is insufficient to prove existence of insurance contract.[65] Exclusion in the insurance policy for bodily injury arising out of use of motor vehicle includes within its scope negligent supervision of students and negligent bus loading procedures. Finally, the court held that it was improper to order insurer under all-liability policy to pay attorney fees incurred by insurer under comprehensive general liability policy.

An Oregon case is instructive on the applicability of insurance to compensate for alleged discriminatory actions. A number of complaints were filed against the school district alleging employment discrimination. The district had primary insurance coverage with a policy of comprehensive general liability insurance and excess insurance policy coverage which would provide higher levels of protection. The insurance companies refused to accept the defense of or liability for any of the employment discrimination claims. Consequently the district had to defend itself, and in the course of doing so settled some cases out of court and then sought reimbursement and attorneys fees from the insurance carrier. The first issue the Oregon appellate court considered was whether the errors and omissions coverage of the comprehensive policy should be interpreted to include defense of alleged discriminatory behavior.[66] The insurance company agreed that discrimination involved intentional conduct and was outside the scope of the coverage. The court held that claims of disparate treatment are not covered by the policy because such allegations involve intentional acts while claims of disparate impact are covered because there is no requirement to show discriminatory intent. Discriminatory claims containing allegations that could be interpreted as disparate impact claims are potentially within the coverage of the policy and the insurer has a duty to defend such claims. This general standard was then applied to a number of discrimination suits filed against the district. A couple of suits involved claims that a district policy regarding pregnant probationary teachers had injured the teachers. The court held that these were claims of disparate impact, and the insurer had responsibility for defending against the claim. Where the district reached a settlement before going to trial, the court held the insurer responsible because the word "suits" in the policy is sufficiently broad to cover administrative hearings before the Oregon State Bureau of Labor or Equal Employment Opportunity Commission. The settlement was made after an administrative hearing had made a finding of substantial evidence to support the charge. Suits alleging harassment because of association with a black man and alleged harassment along with other blacks are claims of disparate treatment and fall outside the insurance coverage. The policies of the excess carriers were held not to obligate coverage or defense of the disparate treatment claims not covered by the primary carrier. Although the policy defined "personal injury" to include discrimination, the alleged discrimination did not come within the policy definition of an "occurance," because it did not "unexpectedly and unintentionally" cause the injury to the complainants.

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[65] St. Paul School Dist. v. Columbia Transit, 312 N.W.2d 41 (Minn. 1982).

[66] School Dist. No. 1 v. Mission Insurance Co., 650 P.2d 929 (Or. Ct. App. 1982).

Although the trial court had split the cost of attorneys fees between the primary and excess carriers, the Oregon appellate court held that the primary carrier was singularly responsible for payment of attorney fees since this policy had obligated them to it.

5.5 ASSAULT AND BATTERY

Assault and battery are usually talked about together although they actually are two separate intentional torts. Battery is an intentional and unpermitted touching of another while assault is an act of putting another in fear of the touching.[67]

In a lunchroom dispute which resulted in a fifteen-year-old boy shattering the bone surrounding a fifteen-year-old girl's left eye, a battery action was instituted to recover damages. The applicable law is that a plaintiff cannot recover damages for a battery if the evidence establishes that the plaintiff is at fault in provoking the difficulty in which the injury complained of is received. The person responding to such aggressive force may use only that force which is necessary to repel the aggression. The trial court held that the plaintiff was barred from recovery because there were sufficient facts to show that the blow to the eye was provoked by her actions. The Louisiana appellate court affirmed the trial court in dismissing the claim.[68]

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[67] *See* PROSSER, note 1, *supra*, Section 9 at 34-41.

[68] Dixon v. Winston, 417 So. 2d 122 (La. Ct. App. 1982).

5.6 DEFAMATION

Defamation is the general term that covers the specific torts of libel and slander; libel applies in general to the written word while slander applies generally to the spoken word. The torts cover words that, in the eyes of the community, invade the person's reputation and good name.[69]

The prima facie case of defamation consists of five elements: (1) defamatory words, (2) publication, (3) falsity, (4) malice, actual or implied, and (5) resulting injury.

Three teachers brought defamation suit against two parents who were talking to the principal and other parents about how these teachers were taking indecent sexual liberties with high school students in their classes. The Louisiana appellate court affirmed the trial court in finding that the parents enjoyed a qualified privilege to talk about these matters.[70] A qualified privilege exists as to a communication, even if false, when made between parties that share an interest or duty and when made in good faith and without malice. It was not unreasonable for the jury to find that statements made about alleged teacher improprieties to the principal and other parents were made in good faith and about a matter of common interest.

Tallent, a classified employee, filed an action to recover actual and punitive damages for allegedly slanderous and defamatory statements made by the superintendent in response to a reporter's question that two people had resigned and that "any claim Mrs. Tallent was fired is false." Over objection of superintendent's counsel the matter was submitted to the jury who found slander and set actual damages at $1,500.

On appeal, not withstanding the verdict, the superintendent argued that the statement was not defamatory and that special damages had not been proven. This last point was central to the North Carolina appellate court's analysis.[71] Defamation distinguishes between slander per se, where no proof of damages need be proven, and slander, per quod, where special damages must be plead and proved. There are four categories of slander actionable per se: Those which charge a person with a crime or offense involving moral turpitude, impeach his trade or profession, impute to him a loathsome disease or charge incontinency to a woman. The facts in this case do not satisfy the elements necessary to impeach one in his trade or profession as alleged false statements are insufficient to do this. Consequently the plaintiff needs to show special damages by pleading actual pecuniary loss at the time the action is instituted. Emotional distress and humiliation are insufficient in themselves to show special damages. Because special damages cannot be shown the appellate court reversed the trial court and ordered a directed verdict for the superintendent.

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[69] *See* Prosser, note 1, *supra*, for a more detailed description.

[70] Desselle v. Guillory, 407 So. 2d 79 (La. Ct. App. 1981).

[71] Tallent v. Blake, 291 S.E.2d 336 (N.C. Ct. App. 1982).

In a defamation suit brought by former school principal against superintendent for remarks made to the school board during proceedings to dismiss the principal, the appellate court held that a Tennessee statute[72] provided absolute immunity for the superintendent.[73] The court analogized the superintendent, who is acting to dismiss employees, to the prosecutor bringing charges against someone, and therefore absolute immunity is appropriate to bar any defamation actions against the superintendent while acting within this scope of employment.

5.7 FALSE IMPRISONMENT

In a case where there was extreme factual disagreement between the parties, a student sought damages from the school district for injuries suffered through an alleged false imprisonment while being held at the school for disciplinary reasons prior to arrival of the police.[74] The New York standard for false imprisonment involves the following elements:

> The action for false imprisonment is derived from the ancient common law action of trespass and protects the personal interests of freedom from restraint of movement. Whenever a person unlawfully obstructs or deprives another of is freedom to choose his own location, that person will be liable for that interference. To establish this cause of action the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was otherwise privileged.[75]

The civil court of the city of New York dismissed the claim because the student was being held pursuant to authority given to the school officials, and the school officials were not exceeding their authority.

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[72] TENN. CODE ANN. § 49-1416(a). "The superintendent . . . shall not be held liable, personally or officially, when performing [his] duties in prosecuting charges against any teacher or teachers under this chapter."

[73] Buckner v. Carlton, 623 S.W.2d 102 (Tenn. Ct. App. 1981).

[74] Smalls v. Board of Educ., 450 N.Y.S.2d 987 (N.Y. Civ. Ct. 1982).

[75] *Id.* at 991.

5.8 TORTIOUS INTERFERENCE WITH A CONTRACT

A teacher alleged that the superintendent had tortiously interfered with her contracted relationship with the board. In Florida the tort of malicious interference with a contract between two persons has been defined as an intentional interference with a contract between two persons where one of the parties is induced to breach the contract to the injury of the other. The appellate court affirmed the trial court in summarily dismissing the claim because the superintendent's refusal to sign the teacher's salary warrants did not induce either the teacher or the board to breach the contract.[76] The superintendent, although not technically a party to the contract, was viewed as enjoying dual control with the board, and therefore could not be considered a third party to the employment relationship for the purposes of the tort of malicious interference with a contractual relationship.

5.9 CONSTITUTIONAL TORTS

In a number of decisions over the past several years the Supreme Court has refined the area of constitutional torts where individuals,[77] absent good faith immunity, and municipalities are liable for depriving persons of constitutional[78] or federal statutory[79] claims. Punitive damages are not available against a municipality[80] under 42 U.S.C. § 1983.[81] A number of cases decided this past term provide guidance about many of the subtleties in this area.

State action is a necessary element for a constitutional tort. The United States Supreme Court elaborated upon the variety of ways that state action might exist in the *Rendell-Baker v. Kohn* decision.[82]

Several teachers who were dismissed from their employment in a private school brought a section 1983 action against the school claiming their constitutional rights had been violated. The school taught handicapped students who were placed there from public schools pursuant to state regulations. Over ninety percent of the school's funding came from public sources, but the state regulations imposed few specific personnel requirements. Before the merits of the section 1983 claim could be reached a determination had to be made whether this school's conduct was state action. The Court looks for four factors to find state action and concludes that none exist in this situation. First, the large amount of support which public moneys provided to the school. The Court held that the relationship was more of a contractual one, and the acts of the private contractors did not become governmental because of their almost total engagement in public contracts. Second, there was extensive regulation by the state of the operation. Generally, the Court has not found regulation to be dispositive of state action. Here the Court had little trouble dismissing this part of the state action claim because the extensive regulations went to the admission and housing of the students, not to employment practices of the institution which was the basis of this suit. Third, was the activity a public function? The Court refined this to be whether the function performed has been traditionally the exclusive prerogative of the state. Since the state allows a private entity to educate some of these handicapped children it is clearly not an exclusive prerogative. Finally, was there a symbiotic relationship between the school and the state? The Court distinguished the facts here from *Burton v. Wilmington Parking Authority*,[83] because of the contractual relationship that exists between the state and the school. Because none of these criteria were satisfied no state action existed.

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[76] Doyal v. School Bd. of Liberty Cty., 415 So. 2d 791 (Fla. Dist. Ct. App. 1982).

[77] Wood v. Strickland, 420 U.S. 308 (1975).

[78] Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Owen v. Independence, 445 U.S. 622 (1980) extends this liability to municipalities and denies immunity to the governing body even if the action was taken in good faith.

[79] Maine v. Thibotout, 448 U.S. 1 (1980).

[80] City of Newport v. Fact Concerts, 101 S. Ct. 2748 (1981).

[81] For a more detailed description of the development of the constitutional tort, *see* The Yearbook of School Law 1980 (P. Piele, ed.) at 260-67; 1981 (P. Piele, ed.) at 226-29 and 1982 (P. Piele, ed.) at 205-08. *See also, Causation In Constitutional Torts*, 67 Iowa L. Rev. 443-83 (1982).

[82] 102 S. Ct. 2764 (1982).

In *Patsy v. Board of Regents of State of Florida*,[84] the United States Supreme Court held that one is not required to exhaust state administrative remedies as a prerequisite to an action under section 1983 unless Congress makes explicit exceptions. Two lower court decisions also dealt with exhaustion of remedies for a tort liability claim.[85]

A federal district court in Nebraska held that the state of Nebraska could not be sued under section 1983.[86]

A case from Texas explored the federal statutory sections that are actionable. A parent of a handicapped student based a claim for relief on 42 U.S.C. § 1983 alleging that, pursuant to *Maine v. Thibotout*,[87] deprivation of the federal statutes, Education For All Handicapped Children Act (EHCA) and section 504 of the Rehabilitation Act, compensatory damages could be sought. The federal district court dismissed these claims because, like here, section 1983 is not applicable in situations where the governing statute provides an exclusive remedy for violations.[88] Because of the availability of a private right of action under the EHCA, the detailed statutory administrative and judicial scheme, and the absence of a traditional damage remedy under the act the court concluded that the judicial remedy under the act was intended to be exclusive of a section 1983 action. The court arrived at the same conclusion about section 504 because it limits the available remedy to equitable relief. In a subsequent case the Eighth Circuit remanded for consideration to the Missouri district court whether monetary damages are available pursuant to section 1983 for alleged violation of section 504 and EHCA.[89]

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[83] 365 U.S. 715 (1961).

[84] 102 S. Ct. 2557 (1982).

[85] Scott v. Unified School Dist. No. 377, 638 P.2d 941 (Kan. Ct. App. 1981) and H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981).

[86] Prettyman v. Nebraska, 537 F. Supp. 712 (D. Neb. 1982).

[87] 448 U.S. 1 (1980).

The availability of damages and attorneys fees arose in several cases reported in 1982. A teacher brought a section 1983 action against the school district challenging the handling of her involuntary leave of absence. Although she was awarded nominal damages of one dollar for the initial failure of the district to provide all necesary procedural safeguards surrounding her layoff, the court refused to award attorneys fees which were in excess of $23,000 because she was not a "prevailing party" as required by statute since she had not prevailed on the other, more major parts of the lawsuit.[90]

A West Virginia Supreme Court decision provides guidance on the legality of school board members using district moneys to pay attorney fees for their defense in federal civil rights action and to pay for settlement that avoids any personal school board member liability.[91] The critical determination is whether the original action of the board members which is the basis of the civil rights suit was done in good faith. This determination of good faith generally tracks the federal standard. An official is not acting in good faith when he knows or reasonably should know that actions taken within the scope of his official responsibility violate another's constitutional rights. The standard of reasonable knowledge applicable to any government official must be determined by the totality of the circumstances in each individual case. Finally, a mere after-the-fact determination that a violation occurred does not necessarily demonstrate lack of good faith.

If the board members acted in good faith it is immaterial that they entered into a settlement with the aggrieved school personnel by which

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88. Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982).
89. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982).
90. Fast v. School Dist. of City of Ladue, 543 F. Supp. 785 (E.D. Mo. 1982).
91. Martin v. Mullins, 294 S.E.2d 161 (W. Va. 1982).

all of the damage issues were settled by a payment of school board funds since if any damages had been recovered against the members of the board as individuals, they would have had a right to indemnification from the board.

Yet if the trial court determines that the board members' actions were not taken in good faith then the court must further inquire into whether there was a significant likelihood that damages would have been awarded against the school board members personally rather than in their official capacities. If there was a significant potential personal liability, the trial court must then determine whether the settlement into which the members of the school board entered reflected an illegal diversion of school board funds for the purpose of insulating the individual defendants from personal liability. The same analysis applies to the use of school board money to hire counsel for overall representation.

5.9a Student-Initiated Cases

Two high school students were given a short-term suspension which complied with *Goss* and Michigan statutory requirements. Subsequent actions of the principal and superintendent extended this suspension without either calling for a formal due process hearing before the board of education to decide on the merits of expulsion or to end the suspension. The federal district court held that this amounted to a deprivation of the students' due process rights.[92] In determining what remedy is appropriate the federal district court concluded that the administrators do not enjoy good faith immunity from liability because they could at best argue that they were confused about the authority for expulsion lying with the board of education, and confusion is insufficient grounds to entitle one to good faith immunity. The students are entitled to compensatory damages. But since the board of education subsequently heard the case and expelled the students for the remainder of the year the only compensation to which they were entitled were nominal damages of one dollar.

A number of cases involved decisions that certain allegations were not actionable under 42 U.S.C. § 1983. One case which involved a wrongful death action brought against the school district, study hall supervisor and principal on the basis of alleged negligence for improper supervision at the time of the stabbing was not actionable under section

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[92] Darby v. School, 544 F. Supp. 428 (W.D. Mich. 1982).

1983.[93] Several cases held that section 1983 claim could not be maintained for relief available under the Education For All Handicapped Children Act.[94] In a number of cases the alleged deprivation was held to be without merit.[95]

5.9b Employee-Initiated Cases

Many cases are brought on alleged deprivation of procedural due process. In one such case the school board decided to not renew the contract of a nontenured teacher because of her apparent emotional instability and resentment. Publication of the alleged emotional instability in open meeting constituted a liberty deprivation, and since no procedural safeguards were provided amounted to a due process violation. The court held that school board members do not enjoy a qualified good faith immunity.[96] Determination of appropriate compensatory and punitive damages against individual board members will be made by the trial court. Punitive damages against the school district are precluded by the *City of Newport* decision.

A teacher's dismissal at mid-year for alleged personal misconduct did not comply with required due process because a pretermination hearing was not provided. The matter was remanded to the district court to determine the compensable damages for mental and emotional distress caused by the failure to provide the hearing, not for distress attributed to the removal from the position which was jusitifed by a post-termination hearing that satisfied all due process requirements.[97]

In a number of other cases there was no deprivation of due process.[98]

The first amendment provides another basis for a constitutional tort claim. In one such case the Eleventh Circuit Court of Appeals affirmed a district court decision that dismissal of two teachers violated the teachers' first amendment rights.[99] It reversed the trial court for refusing to reinstate the teachers to their teaching positions. There is a rule that reinstatement is presumed to be the appropriate remedy for unconstitutional discharge, and a suggestion of friction on the job between the teachers and others in the school is insufficient grounds for denying reinstatement.

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[93] Close v. Voorhees, 446 A.2d 728 (Pa. Commw. Ct. 1982).

[94] McGovern v. Sullins, 676 F.2d 98 (4th Cir. 1982) (Civil rights claim could not be maintained for relief available under the EHCA.); Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982) (Civil rights statute not available to enforce a claim under EHCA.); Noe v. Ambach, 542 F. Supp. 70 (S.D.N.Y. 1982) (Violation of EHCA may not be basis of an action under section 1983, and therefore cannot trigger attorney fee provision under Civil Rights Attorney's Fees Awards Act.); and William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982) (Federal district court refused to dismiss class action suit by handicapped students alleging that state's distinction between educational and noneducational costs, and refusal to fund noneducational costs, violated state and federal special education statutes and federal and state equal protection clauses.).

[95] Reineman v. Valley View Commun. School Dist. No. 365-U, 527 F. Supp. 661 (N.D. Ill. 1981); Stern v. New Haven Commun. Schools, 529 F. Supp. 31 (E.D. Mich. 1981); and Diggles v. Corsicana Indep. School Dist., 529 F. Supp. 169 (N.D. Tex. 1981).

[96] Bomhoff v. White, 526 F. Supp. 488 (D. Ariz. 1981).

[97] Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

[98] Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982); Board of Educ. of Bellevue v. Rothfuss, 639 S.W.2d 545 (Ky. 1982); and Maddox v. Clackamas Cty. School Dist. No. 25, 643 P.2d 1253 (Or. 1982).

In several other cases the claimed first amendment deprivation was held to be without merit.[100]

A Michigan case granted summary judgment to the board of education in approving an affirmative action layoff provision of a collectively bargained contract which had been challenged by a group of nonminority faculty.[101]

The Oakland school board passed an affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by the district. When sued under the policy for allegedly violating the equal protection clause the court held that school board members enjoyed a good faith qualified immunity, and although the school board and school district do not enjoy immunity as entities they nonetheless are not liable because the policy does not violate the fourteenth amendment.[102]

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[99] Allen v. Antauga Cty. Bd. of Educ., 685 F.2d 1302 (11th Cir. 1982).

[100] Hadley v. Moffat Cty. School Dist. RE-1, 641 P.2d 284 (Colo. Ct. App. 1981); Derrickson v. Board of Educ. of City of St. Louis, 537 F. Supp. 338 (E.D. Mo. 1980); and Burris v. Willis Indep. School Dist., 537 F. Supp. 801 (S.D. Tex. 1982).

[101] Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D.Mich. 1982).

[102] Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981).

6

FINANCE

Richard A. and Daniel M. Rossmiller

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6.0 INTRODUCTION

During the period of time covered by this review, the highest court in each of three states (New York, Colorado and Georgia) upheld the constitutionality of existing state school finance programs in those states, in two instances reversing decisions by lower courts. Issues related to taxation for schools and the uses of school revenue also were prevalent.*

6.1 SOURCES AND ALLOCATION OF PUBLIC SCHOOL FUNDS

6.1a State School Finance Programs

The United States Supreme Court, in a divided opinion, affirmed lower court decisions declaring unconstitutional a Texas statute denying any state funds for the education of children not legally admitted into the United States.[1] The statute in question[2] limited state aid to children who were citizens of the United States or legally admitted aliens. It also provided that school boards could deny enrollment in public schools to children not legally admitted to the country. Suit was brought on behalf of alien children who were excluded from the public schools of the Tyler Independent School District. The federal district court ruled in favor of the plaintiff children,[3] as did the Fifth Circuit Court of Appeals.[4]

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* Editor's note: Cases dealing with public funds for private schools and funds for special education are reviewed in Chapter 4 of the *Yearbook*.

The Supreme Court ruled that illegal alien children were entitled to the benefits of the equal protection clause which applies to all persons, including those in the country illegally. The Court also held that a statute discriminating against undocumented alien children could not be considered rational unless it furthered some substantial goal of the state. The Court commented:

> Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.021, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these counterveiling costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.[5]

The Court ruled that the undocumented status of the children did not establish a sufficient rational basis for denying them the benefits of education. The Court could find no national policy that would justify the state in denying the children an elementary education, and concluded that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[6] The Court therefore found that "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[7]

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1. Plyler v. Doe, 102 S. Ct. 2382 (1982).
2. TEX. EDUC. CODE ANN. § 21.031.
3. Plyler v. Doe, 458 F. Supp. 569 (E.D. Tex. 1978).
4. Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980).
5. Plyler, *supra*, note 1 at 2398.
6. *Id.* at 2402.
7. *Id.*

New York's highest court upheld the constitutionality of that state's school finance program,[8] thus overruling previous decisions by lower courts in New York.[9] This action had been originated by school boards and students in "property-poor" school districts. The action later was joined by intervenors representing the state's largest cities, New York, Buffalo, Rochester, and Syracuse. The trial court held that New York's state aid program violated both the state and federal constitutions.[10] Upon appeal, it was determined that the state aid program did not violate the federal constitution but did violate the New York Constitution.[11]

The Court of Appeals of New York rejected the claim by the intervenors that metropolitan overbuden must be remedied by compensatory increases in state aid to city school districts. It noted with approval the opinion of the lower court that it was beyond the power of the court to determine whether budgets had been fairly divided between competing municipal services, or whether the available funds had been used wisely by the school districts.

With regard to the question of whether New York's constitution was violated by the state school aid program, the court addressed first the question of the standard to be applied. Citing previous United States Supreme Court and New York decisions, the court reiterated that the rational basis test was the proper standard for review in this case. It noted that stricter scrutiny is appropriate when intentional discrimination against a class of persons is claimed, but the claim of discrimination in this instance was between property-poor and property-wealthy school districts. The court found no authority to support the claim that discrimination between units of local government would call for other than rational basis scrutiny. The court concluded that "the justification offered by the State—the preservation and promotion of local control of education—is both a legitimate State interest and one to which the present financing system is reasonably related."[12] The court noted the existing system permits the instructional program in the districts throughout the state to reflect the needs and desires of the community. It noted:

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[8] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

[9] *See* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1982] at 212-13.

[10] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 408 N.Y.S.2d 606 (N.Y. Sup. Ct. 1978).

[11] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 443 N.Y.S.2d 843 (N.Y. App. Div. 1981).

[12] Board of Educ., Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982).

> Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts—whether by providing that revenue for local education shall come exclusively from State sources to be distributed on a uniform per pupil basis, by prohibiting expenditure by local districts of any sums in excess of a legislatively fixed per pupil expenditure, or by requiring every district to match the per pupil expenditure of the highest spending district by means of local taxation or by means of State aid (surely an economically unrealistically hypothesis)—would inevitably work the demise of the local control of education available to students in individual districts.[13]

Thus, the court held that the existing state aid program did not violate the equal protection requirements of the New York Constitution.

The court noted that article XI, section 1 of the New York Constitution adopted in 1894 does not require that the education available in every district be equal or substantially equal. It interpreted the term "education" to connote a sound basic education and determined that the constitutional requirement was being met under the existing system. In concluding its discussion, the court stated:

> Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy—something not shown to exist in consequence of the present school financing system.[14]

The Supreme Court of Georgia held that state's sytem of financing public education did not violate the equal protection provisions of the state constitution.[15] Parents, children, and school officials who resided in low-wealth school districts alleged that the state school aid program violated the equal protection provisions of the Georgia Constitution and deprived children of an adequate education. The trial court found that the state aid system violated the equal protection provisions of the constitution but that it did not deprive children of an adequate education. The Georgia Supreme Court, after reviewing the history of the constitutional provisions for education, concluded:

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[13] *Id.* at 367.

[14] *Id.* at 369.

[15] McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

> The Georgia Constitution thus contains very specific provisions relating to the obligation of localities to impose a tax for the maintenance of the public schools and general provisions imposing a duty on the state and General Asembly to provide its citizens an "adequate education." Nowhere in Article VIII of the Constitution is there any express statement as to the obligation of the state to equalize educational opportunities.
>
> In view of the foregoing, we must conclude that the "adequate education" provisions of the constitution do not restrict local school districts from doing what they can to improve educational opportunities within the district, nor do they require the state to equalize educational opportunities between districts.[16]

The court also held that the state school finance program did not violate the equal protection provisions of the constitution. The court found that education is not a fundamental right under the state constitution and thus the public school finance system must only satisfy the "rational relationship" test. It noted the Georgia system preserves the idea of a local contribution and concluded:

> The fact that the state has not *funded* a large-scale equalization plan does not render the current public school finance system invidiously discriminatory. In terms of equalization the system is a poor one. However, the system does bear some rational relationship to legitimate state purposes and is therefore not violative of state equal protection. . . .
>
> Our holding that the current system of financing public education in Georgia is not unconstitutional should not be construed as an endorsement by this court of the status quo. Constitutions are designed to afford *minimum* protections to society. Plaintiffs have shown that serious disparities in educational opportunities exist in Georgia and that legislation currently in effect will not eliminate them. It is clear that a great deal more can be done and needs to be done to equalize educational opportunities in this state. For the present, however, the solutions must come from our lawmakers.[17]

The consitutionality of Colorado's state school finance program was upheld by that state's highest court.[18] The case was brought by children residing in sixteen school districts who claimed that because they lived in property-poor school districts, they received an inadequate education because the state did not provide sufficient funding to compensate for deficiencies in local wealth. Thus, they claimed they were denied the equal protection required by the Colorado Constitution and the "thorough and uniform" system of public schools required by article IX, section 2 of the state constitution. The trial court ruled in favor of the plaintiffs, holding the existing school finance program violated both the thorough and uniform and equal protection requirements of the constitution. The Supreme Court of Colorado disagreed, holding that the state school finance system did not violate either the thorough and uniform provision or the equal protection provision, and also upheld the state's method of capital outlay financing. The court rejected the argument that low-wealth school districts composed a "suspect class," noting:

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[16] *Id.* at 164.

[17] *Id.* at 168.

[18] Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

> *First*, the criteria for a suspect class cannot be met by a school district regardless of the merits . . . the equal protection clause emobides personal rights, and by its very terms is limited to individuals. . . .
>
> *Second*, there is no distinct and insular "class" of poor persons as required for equal protection analysis. Under this analysis, we define a "class" as being a group marked by common attributes or characteristics. Here, however, the alleged class of "poor persons," while possibly linked by their respective income levels, have no common attribute relative to Colorado's school financing system. The evidence does *not* show that poor persons in Colorado are concentrated in low-property wealth districts, or that they uniformly or consistently receive a lower quality education, or that the districts in which they reside uniformly or consistently expend less money on education.[19]

Having determined that no suspect class or fundamental right was involved in the case, the court then turned to the question of whether the Colorado public school finance system rationally furthers a legitimate state purpose and stated:

> We find that utilizing local property taxation to partly finance Colorado's schools is rationally related to effectuating local control over public schools. The use of local taxes affords a school district the freedom to devote more money toward educating its children than is otherwise available in the state-guaranteed minimum amount. It also enables the local citizenry greater influence and participation in the decision making process as to how these local tax dollars are spent. Some communities might place heavy emphasis on schools,

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[19] *Id.* at 1020.

> while others may desire greater police or fire protection, or improved streets or public transportation. Finally, local control provides each district with the opportunity for experimentation, innovation, and a healthy competition for educational excellence.
>
> Although we recognize that due to disparities in wealth, the present finance system can lead to the low-wealth district having less fiscal control than wealthier districts, this result, by itself, does not strike down the entire school finance system. . . .
>
> Although all educational financing cases are *sui generis* in the sense that the alleged deprivation is relative rather than absolute, here, we find no discrimination, invidious or otherwise, in a system that applies a uniform subsidy formula on a statewide basis, while concurrently promoting community control by means of local taxation.[20]

The court then turned to the question of whether the state school financing system violated the "thorough and uniform" requirement of the constitution. The plaintiffs had argued that this clause requires the state to provide equal educational opportunity to school children. The court disagreed, ruling that the constitutional requirement

> is satisfied if thorough and uniform educational opportunities are available through state action in each school district. While each school district must be given the control necessary to implement this mandate at the local level, this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard. In short, the requirement of a "thorough and uniform system of free public schools" does not require that educational expenditures per pupil in every school district be identical.[21]

A fifth appeal was heard in *Serrano v. Priest*[22] on behalf of plaintiff's counsel who sought to enforce a trial court judgment awarding attorney's fees. Following the plaintiff's successful constitutional challenge to the California public school financing system, an order was filed directing various state defendants to pay $800,000 in fees to the plaintiff's counsel. The order awarding attorney's fees was affirmed by the California Supreme Court, which held that the trial court had acted within the proper limits in granting the fee award.[23] After unsuccessful attempts to obtain voluntary payment of the award, counsel sought an order directing the defendants (the state treasurer, the state superintendent of public instruction and the state controller) to satisfy the earlier judgment. The trial court granted the motion and entered an order which was at issue in this fifth appeal.

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[20] *Id.* at 1023.

[21] *Id.* at 1025.

[22] 182 Cal. Rptr. 387 (Cal. Ct. App. 1982).

[23] Serrano v. Priest, 569 P.2d 1303 (Cal. 1977).

The order directed the state controller to pay the $800,000 award, plus interest, from funds appropriated by the legislature for the "operating expenses and equipment" of the department of education, superintendent of public instruction, and state board of education. The trial court also ordered the defendants to set aside from the 1979-80 "operating expenses and equipment" appropriation a sum sufficient to satisfy the judgment with interest. The state superintendent and state controller appealed and the supreme court stayed that portion of the trial court order requiring that funds be set aside after finding that nearly all of the appropriation had been either disbursed or earmarked for the payment of contracts.

However, in June, 1981, the California Supreme Court affirmed a trial court payment order for attorney's fees in another case in which an order directed the state controller to pay $25,000 plus interest from funds appropriated to the department of health services.[24] Shortly after the decision in *Mandel*, counsel for *Serrano* moved that the court of appeals dismiss the defendant's appeal and summarily affirm the payment order at issue. The court vacated the supreme court's stay of the "set aside" order and summarily affirmed the trial court's order for payment of the attorney's fee. It also disposed of two remaining issues. The court recognized that only the Budget Act of 1979 was in effect when the trial court entered its payment order in February, 1980, and that the trial court had no authority to order the payment of the award from funds not yet appropriated by the legislature. The court found the holding in *Mandel* made the subsequent 1980-81 and 1981-82 "operating expense appropriations" for the department of education available for payment of the attorney's fee award even if the 1979-80 appropriation had been exhausted. The court also invalidated certain sections of the 1980 and 1981 Budget Acts which attempted to prohibit the use of funds appropriated in these bills for payment of court-awarded attorney fees. The court found these sections invalid in so far as they attempted to readjudicate the 1975 judgment citing the "separation of powers doctrine" set forth in article III, section 3 of the California Constitution.

In another California case, this one stemming from actions taken in the aftermath of Proposition 13, it was determined that an item in a school district's 1977-78 budget labeled "apropriation for contingencies" was not a "reserve" and the school district's state aid was reduced accordingly.[25] Shortly after Proposition 13 was adopted, the legislature passed an emergency measure known as the "bail-out" bill which appropriated several billion dollars in state funds for the use of local agencies, including school districts, and provided a distribution formula by which aid to school districts was to be determined for the 1978-79 fiscal year. Under the terms of the bill funds which had not been reserved prior to June 6, 1978, and which exceeded five percent of the district's general fund total revenue, would reduce the amount of state funds otherwise allocable to the district. The California Department of Education had determined the district's budget contained an "appropriation for contingencies" with an unexpended ending balance. The district claimed the funds in question constituted a "contingency reserve" and thus were immune from the reduction formula. The trial court concluded the account was an annual appropriation account, not a "reserve," within the meaning of the bail-out bill. Upon appeal, the trial court's ruling was affirmed because there was substantial evidence to support its finding that the account in question was an "appropriation" rather than a "reserve." Thus, it was held that the department of education's determination reducing the district's state aid was correct.

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[24] Mandel v. Myers, 629 P.2d 935 (Cal. 1981).

A New York school district sought a determination of whether it was obligated to repay money it had received from the state's health insurance reserve receipts fund.[26] The district maintained that the portion of the statute obligating it to repay money it received from the fund had been repealed by implication by another statute enacted in the same legislative session. The trial court ruled in favor of the district but the decision was reversed on appeal. The court pointed out that the doctrine of repeal by implication is strongly disfavored and is not to be invoked unless the two statutes in question are clearly repugnant. The court could find no repugnancy between the two statutes, pointing out that they were not only enacted at the same session, but were passed on the same day of the session.

The same statutes were at issue in another New York case in which a school district sought a declaratory judgment that would permit it to withdraw from the state health insurance plan without a consequent loss of state aid.[27] The district's motion was denied, with the court holding that one statute did not repeal another by implication and that the school aid apportionment plan adopted by the legislature was not unconstitutionally vague.

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[25] Edison School Dist. v. Ross, 182 Cal. Rptr. 312 (Cal. Ct. App. 1982).

[26] Board of Educ., Syracuse City School Dist. v. Regan, 449 N.Y.S.2d 808 (N.Y. App. Div. 1982).

[27] Board of Educ. of Deer Park Union Free School Dist. v. Carey, 442 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1981).

A Montana case involved the question of whether a high school district was entitled to receive interest and income money from land grants, gifts, estates and other sources despite the fact that it had not held 180 days of pupil instruction as required by law.[28] The court found the statutes governing payments of the interest and income money to be so conflicting as to defy interpretation. The statutes in question were found to be penal statutes and the penal provisions were declared void. The court also upheld payment of reasonable attorney fees and costs incurred by the plaintiff and held that the high school district was entitled to receive its interest and income money.

A Utah case involved disposition of the proceeds of mineral rights on state school lands.[29] The director of the Division of Utah State Lands, the defendant in the case, placed the mineral proceeds in the state school fund. Only interest earned on this fund was placed in the uniform school fund for operational purposes. The state auditor, who was plaintiff, claimed that the proceeds from the mineral rights should be deposited in the uniform school fund. The trial court rejected this contention and an appeal was taken. The Utah Supreme Court ruled that the Jones Act freed federally granted school sections from any restriction or limitation except that they be used for public schools. The court held that Utah, as a sovereign state, was free to place the proceeds from ineral rights in the uniform school fund and so ordered.

A case decided by the Supreme Court of Oregon dealt with whether a tax on the sale of oil and natural gas was to be dedicated to the common school fund.[30] The director of the Oregon Department of Energy assessed a tax based on the number of thermal units of energy sold by energy resource suppliers. Plaintiffs sought invalidation of the order, claiming it violated article VIII, section 2(1)(g) and/or article IX, section 3b of the Constitution of Oregon. The Oregon statute[31] provided for funding the activities of the state department of energy by fees assessed against energy resource suppliers. The statute was later amended to change the basis of assessments to a portion of gross operating revenue. It was held that the proceeds of taxes assessed on the basis of energy resources sold were required under the provisions of the constitution to be dedicated to the common school fund. Consequently, the director's order was invalidated insofar as it involved taxes assessed on the basis of energy resources sold and a directive to assess taxes exclusively on a gross revenue basis was issued.

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[28] Missoula High School Legal Defense Ass'n v. Superintendent of Pub. Instr., 637 P.2d 1188 (Mont. 1981).

[29] Jensen v. Dinehart, 645 P.2d 32 (Utah 1982).

[30] Northwest Natural Gas Co. v. Frank, 648 P.2d 1284 (Or. 1982).

[31] Or. Rev. Stat. § 469.420.

6.1b Federal Funds for Education

In a case decided by the Third Circuit Court of Appeal, New Jersey and Pennsylvania petitioned for review of final decisions by the United States Department of Education directing that they repay Elementary and Secondary Education Act funds that allegedly were misapplied.[32] The states contended that the Department of Education had no statutory authority to demand repayment of the funds. The court agreed with them, stating:

> We therefore hold that an administrative agency has no authority to order repayment of funds misapplied or misspent by federal grant participants unless Congress, at the time the funds are received, has declared its intention to empower the agency to exercise such a remedy. In the absence of congressional authority, the remedy exists, if at all, only at common law. We further hold that if an agency employing an advance-funding scheme such as that provided for Title I relies on a common-law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction.[33]

In a case arising in West Virginia an order by the United States Department of Education requiring the state to refund $125,000 it had received under Title I of the Elementary and Secondary Education Act of 1965 was upheld.[34] A county board of education in West Virginia with the approval of the state board of education, had used the money to pay for an administrative office complex occupied by Title I personnel. A subsequent audit of the district's Title I program led to a recommendation that the district be required to refund the $125,000 because it had not been spent for "school facilities" as required by the law. The Fourth Circuit Court of Appeal held that the Secretary of Education was empowered to recover misspent funds, that appropriate appeal procedures had been provided, and that funds granted under Title I of the Elementary and Secondary Education Act could not be used to pay for an administrative office complex.

A case decided by the Supreme Court of Missouri involved the entitlement of a school district to participate in the distribution of forest reserve funds.[35] A school district sought a declaratory judgment that it was entitled to a mandatory distribution of forest reserve funds derived from the Mark Twain National Forest Reserve. The issue was whether the district, which was adjacent to the national forest, was entitled to a mandatory distribution of the forest reserve funds under section 12.070 of the Missouri statutes. Shannon County, in which the national forest was located, decided to allocate the funds on an acreage formula under which the Eminence School District would not participate. The court noted that federal law[36] allows the states to distribute forest reserve funds in any manner they choose so long as the specified purposes of the statute—to benefit public schools and roads of the county in which the national forest is situated—are met. It is ruled that the Missouri legislature had not specified a particular method of distribution, leaving that to the discretion of the county court. Thus, it concluded that the Eminence School District could legally be excluded in the distribution of the forest reserve funds.

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[32] State of New Jersey, Dep't of Educ. v. Hufstedler, 662 F.2d 208 (3d Cir. 1981).

[33] *Id.* at 218.

[34] West Virginia v. Secretary of Educ., 667 F.2d 417 (4th Cir. 1981).

6.1c School Fees

A North Carolina case involved, among other issues, the authority of a public school district to permit the use of a school building without charge after school hours for a program designed to alleviate the problem of the "latch key" child.[37] The plaintiffs in this case were owners and operators of day care centers who sued to enjoin the school board from conducting an extended day care program at an elementary school. The program in question operated after the close of the school day and provided a supervised program in which students could do homework, study, or engage in athletic or artistic activities. Tuition of $15 per day was charged to participants to defray the cost of program staff and the school board provided free use of the elementary school. The North Carolina Court of Appeals affirmed the trial court's decision, holding that the school board was free to permit the use of the building for such purposes, that the constitutional requirement of a uniform public school system was not violated by the program, and that the constitutional requirement that all expenditures of tax dollars be for a public purpose was not violated because the intent of the program was to further the educational achievement of participating students.

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[35] Eminence R-1 School Dist. v. Hodge, 635 S.W.2d 10 (Mo. 1982).

[36] 16 U.S.C. § 500.

[37] Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklengurg Bd. of Educ., 285 S.E.2d 110 (N.C. Ct. App. 1981).

6.2 SCHOOL TAX ISSUES

6.2a Power to Tax

Several cases arising in California in the wake of the June 1978, voter approval of Proposition 13, which limited the tax on real property, reached the appellate level. In one case a county appealed from a judgment requiring it to provide or fund housing for the superintendent of schools.[38] Since prior to 1965 the county school superintendent had occupied space in a county-owned building. In February, 1965, the county adopted a resolution transferring to the board of education many of its duties and functions. However, the county retained its obligation to provide "housing" for the county superintendent. The county later passed another resolution elaborating the nature of this obligation and providing that the superintendent would continue to occupy the county-owned office space used by the board of education and fixing the rental at $1 per year. After passage of Proposition 13 the county found itself short of revenue and proposed raising the rent from $1 per year to $8,000 per month. The school board responded by filing this action. The trial court held that the county's action setting the rent at $8,000 per month was invalid and enjoined the county from evicting the superintendent or charging the increased rental prior to the end of the fiscal year. The trial court directed the county either to continue to furnish and pay for office space for the superintendent of schools or transfer the necessary funds so that the superintendent could rent space elsewhere. The trial court's action was affirmed by the California Court of Appeals.

A case decided by the Supreme Court of Georgia involved the question of whether or not a county was entitled to a percentage of past due school taxes collected by the tax commissioner.[39] Six legislative acts and three constitutional provisions were involved in the case. Under legislation adopted in 1955 Chathem County was not entitled to a fee for collecting school taxes. In 1980 a statute was adopted setting a fee of one percent in counties with a population of between 190,000 and 300,000. Following a review of the sequence of legislative actions, the court concluded that Chatham County was not entitled to a fee for school taxes it had collected during 1980, but was entitled to a fee of one percent of the school taxes collected effective January 1, 1981, because at that time the county officially reached a population size greater than 190,000.

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[38] County Bd. of Educ. v. County of San Luis Obispo, 178 Cal. Rptr. 703 (Cal. Ct. App. 1981).

[39] Chatham Cty. v. Kiley, 288 S.E.2d 551 (Ga. 1982).

Another Georgia case dealt with the constitutionality of a local amendment authorizing the imposition of excise taxes on alcoholic beverages sold within Habersham County.[40] Georgia permits "local amendments" to its constitution, a fact which permits the Georgia Constitution to differ form one county to another within the state. At its 1980 session the general assembly passed a resolution proposing a local amendment, which was later adopted by a majority of the voters in Habersham County, authorizing the imposition of excise taxes on alcoholic beverages sold within the county with the proceeds to be used for educational purposes. Suit was brought seeking to have the local amendment declared unconstitutional under the due process and equal protection clauses of the fourteenth amendment. The trial court determined that the amendment violated the fourteenth amendment and an appeal was taken. The Georgia Supreme Court reversed the trial court, holding that the local amendment had been properly ratified and the fact that liquor was sold only in incorporated areas in the county did not violate the equal protection guarantees.

A Kentucky case questioned the validity of a utility gross receipts tax adopted by a board of education.[41] The board of education adopted a resolution levying a two percent utility gross receipts tax and an opposing group circulated petitions in opposition to the tax. (If such petitions are properly filed, the result is to suspend the tax levy until the question can be placed on the ballot for voter approval at the next election.) The petitions were delivered to the board of elections, which checked signatures and addresses against voter registration cards and found what it believed to be sufficient correct signatures to place the issue on the ballot. However, when the superintendent of schools and his staff checked the signatures against the voter registration cards they concluded that 466 signatures were not properly signed and certified. The board of education then filed an action seeking an injunction against placing the matter on the ballot. The trial court ruled in favor of the board of education and the Kentucky Court of Appeals affirmed the trial court ruling. It held that the petitions in opposition to the tax were not "verified by affidavit" as required in order to place a question on the ballot for voter approval at the next election.

The Supreme Judicial Court of Massachusetts, acting in response to a request by the state senate, expressed its opinion concerning a proposed constitutional amendment.[42] One part of the proposed amendment established requirements for increasing the budget limit for regional school districts which differed from those applicable to school districts in cities and towns. The senate posed the question of whether or not this would deny equal protection of law to students in school districts in cities and towns. The court noted that, based upon its reasoning in *Rodriguez*,[43] the United States Supreme Court does not regard equal access to educational opportunities as a fundamental right and it would not regard students attending regional or local schools to be a suspect class. The court, therefore, considered whether a rational basis existed for the proposed distinction and concluded that such a basis did exist. It held that the proposed differences in treatment would not violate students' right to equal protection of the laws.

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[40] Sims v. Town of Baldwin, 290 S.E.2d 433 (Ga. 1982).

[41] Board of Elections of Taylor Cty. v. Board of Educ. of Campbellsport Indep. School Dist., 635 S.W.2d 324 (Ky. Ct. App. 1982).

[42] *In re* Justice to the Senate, 436 N.E.2d 935 (Mass. 1982).

In a case decided in Missouri taxpayers brought an action seeking recovery of a portion of the taxes that had been assessed against their property and which they had paid under protest.[44] They contended that an additional school tax levy of forty-eight cents per $100 assessed valuation was valid only for the years 1976 and 1977 because the ballot presented to the voters had provided for the additional tax to be authorized only for a period of two years. However, the school district continued to levy and collect the additional tax after the two year period had elapsed. The school board claimed that it was not necessary to have the authorization for the additional tax renewed and that the plaintiffs, who were corporate taxpayers and not voters, did not have standing to challenge the levy. The Missouri Court of Appeals ruled that the plaintiffs did have standing and held that the plaintifs were entitled to recover the taxes paid under protest. The court commented:

> A reasonable application of Art. X, § 11(c) requires that the tax rate should be extended beyond the time represented to the public .... For intervenor's position to be upheld, we would have to find that the constitution sanctioned the presentation of misleading information to voters. We do not think that in adopting this provision of the constitution, the people of Missouri intended that result or conceived that such might occur. The authorization ... to continue the last approved tax rate can only reasonably mean the last tax rate approved without any time limitation.[45]

The *Newsday* case discussed in preceding yearbooks,[46] reached the Court of Appeals of New York. That court affirmed lower court decisions holding that because the property of Newsday, Inc. was not encompassed by a school board resolution removing an exemption from property taxes as permitted by New York statute, the property in question was entitled to exemption.[47]

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[43] 411 U.S. 1 (1973).

[44] Southwestern Bell Telephone Co. v. Wickliffe, 629 S.W.2d 818 (Mo. Ct. App. 1982).

[45] *Id.* at 622.

[46] YEARBOOK 1982 at 227.

In another New York case a taxpayer attempted to prevent a school district from levying taxes for the 1980-81 school year on any tax assessment roll other than the 1980 tax role.[48] Rensselaer County had conducted a county-wide evaluation of real property in 1980. Because the final tax rolls were not available in a timely manner, the school district used the 1979 assessment roll for its school tax levy. The court held that the only requirement was that school districts use the latest of the final assessment rolls, in this case the 1979 roll, and the petitioner was not entitled to relief.

Taxpayers in Troy, New York, sought a refund of real estate taxes that had been levied and collected by the city school district, claiming the taxes were in excess of constitutional limitations.[49] The city moved to dismiss the complaint on the ground that Niagara Mohawk had failed to present a written verified claim to the governing body of the school district as required by the education law. The court rejected this contention, ruling that when a tax statute is alleged to be unconstitutional it may be challenged by proceedings other than those prescribed by the statute as "exclusive." Thus, the court held that letters of protest that had been filed with the tax payments were sufficient to place the city on notice and that it was not necessary for the taxpayer to file a verified claim under these circumstances.

In another New York case a taxpayer and students of the school district appealed a lower court decision[50] which had upheld the authority of a local board of education to adopt an "austerity budget." The case reached the New York Supreme Court after the decision by the New York Court of Appeals in *Levittown* discussed earlier in this chapter. The court in the instant case noted that it was now clear the rational basis test was the appropriate standard to be applied and that "[u]nder the rational basis test, plaintiffs bear the burden, which they have not carried, of demonstrating that the questioned classification has no rational relationship to a legitimate legislative goal."[51] The court held that section 2023 of the education law was constitutional and that adoption of an austerity budget in accordance with the provisions of the statute was proper.

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[47] Newsday, Inc. v. Town of Huntington, 434 N.E.2d 226 (N.Y. 1982).

[48] Sterling Drug, Inc. v. Heintz, 442 N.Y.S.2d 630 (N.Y. App. Div. 1981).

[49] Niagara Mohawk Power Corp. v. City School Dist. of City of Troy, 453 N.Y.S.2d 807 (N.Y. App. Div. 1982).

[50] YEARBOOK 1982 at 227-28.

[51] Brown v. Board of Educ., Whitesboro Cent. School Dist., 453 N.Y.S.2d 883, 885 (N.Y. App. Div. 1982).

A case decided by the Supreme Court of Oregon involved the taxation of submerged or submersible lands owned and leased by the state.[52] The lands in question had been leased by the plaintiff, who claimed the assessment of the lands by Clatsop County was contrary to the statute providing for taxation of state-owned lands leased to taxable individuals[53] and that it violated article VIII, section 5 of the Oregon Constitution. The tax court ruled against the plaintiff and the decision was appealed to the Supreme Court of Oregon. The court held that it was clear from the statute that when public property is put to some private use, whether by lease or sale, it is no longer exempt from taxation. It also ruled that the statute in question did not violate the state constitution.

A taxpayer in Pennsylvania appealed an order of the trial court dismissing his appeal from assessment of school taxes.[54] The taxpayer owned and operated a driving school business. He claimed that after the School District of Erie initiated a driver training program, the number of students attending his driving school was greatly diminished with a resulting loss of income. He contended that the taxes imposed on his real estate for school purposes were being used to subsidize a driver education program which competed directly with his business, and that imposition of such taxes was a denial of due process and equal protection because it discriminated against his vocational pursuit. The court ruled that if the plaintiff were attempting to appeal from his real estate assessment, his action was premature because he had not followed the required statutory route by appealing to the board of assessment appeals. If, however, the plaintiff was attempting to commence an original action seeking a ruling that he was exempt from paying school taxes now and in the future, he had failed to plead a cause of action.

The Pennsylvania Game Commission challenged real estate taxes levied on its property by a school district on the ground that it was exempt from taxation.[55] The commission had acquired title to the property after the 1979 assessment roll was prepared. School taxes subsequently were levied on the property for the fiscal year beginning July, 1979. The court ruled that Pennsylvania provided a statutory remedy to challenge property tax levies and concluded that the remedy provided by statute was the exclusive remedy. Consequently, it decided that it lacked jurisdiction to adjudicate the issue and the complaint was dismissed.

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[52] Johnson v. Department of Revenue, 639 P.2d 128 (Or. 1982).

[53] OR. REV. STAT. § 307.110.

[54] Hreha v. Erie Cty. Tax Claim Bureau, 437 A.2d 1084 (Pa. Commw. Ct. 1981).

[55] Pennsylvania Game Comm'n v. Luzerne Cty. Tax Claim Bureau, 444 A.2d 783 (Pa. Commw. Ct. 1982).

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An another Pennsylvania case, the commonwealth court was called upon to interpret statutory provisions governing a school board's power to tax.[56] The School District of Pittsburgh raised its real property tax by twelve mills and its earned income tax from one percent to two percent to meet its budgetary requirements. The trial court ruled the school district had no power to levy a tax on wages, salaries, commissions, and earned income of residents and the district appealed. The commonwealth court held that the school board's power to tax the earned income of its residents was limited to a tax of one percent and that the school board had no authority to increase by ordinance any legislatively established tax rate limitations.

The Elizabethtown School District imposed a tax on the privilege of obtaining a building permit and engaging in building construction. Persons affected by the tax brought suit claiming the tax was invalid because the building of homes was a manufacturing process exempted under the Local Tax Enabling Act.[57] The commonwealth court found that the construction of homes was not a manufacturing process and thus was not beyond the taxing authority of the school district. The appellants further asserted that a one percent tax was unreasonable and therefore invalid. The court agreed with this contention, holding that a one percent tax on building permits was a levy imposed primarily upon newcomers to the school district and declared the tax to be invalid. The court commented: "Although the record here evidences no conscious exclusionary intention on the part of the authors of this tax, its effect, despite their proper concern for their schools, undeniably is to exempt most of the present residents from an added tax, while collecting it mostly from families coming into the community."[58]

The Moon Area School District established a tax on parking in all nonresidential parking facilities located within the district. The tax was levied at the rate of fifteen percent on each parking transaction and operators were required to obtain a registration certificate at a cost of $10 annually. The constitutionality of the tax was challenged, the trial court declared the tax unconstitutional, and appeal was taken.[59] The plaintiff contended that the tax violated the commerce clause of the United States Constitution but the Supreme Court of Pennsylvania did not agree, holding that the tax did not violate the commerce clause either on the theory that it discriminated against interstate commerce or on the theory that it was not fairly related to services provided by the school district. The court also ruled the tax did not violate due process on the theory that the school district provided no benefits in exchange for the tax. The court commented: "A taxpayer may not successfully object, on the grounds of the 'benefit theory,' to taxation for a general public use which includes taxes for schools."[60] It was also ruled that the transactions at parking lots were not "retail sales" and thus were not subject to a two percent limitation on sales taxes imposed by the local Tax Enabling Act.

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[56] School Dist. of Pittsburgh v. City of Pittsburgh, 443 A.2d 1206 (Pa. Commw. Ct. 1982).

[57] Heisey v. Elizabethtown Area School Dist., 445 A.2d 1344 (Pa. Commw. Ct. 1982).

[58] *Id.* at 1347.

[59] Airway Arms, Inc. v. Moon Area School Dist., 446 A.2d 234 (Pa. 1982).

At issue in a case involving the School District of Philadelphia was the question of whether the controlling statute of limitations for filing petitions for a refund of the general business tax imposed by the school district was a two-year or a six-year period.[61] The taxpayer had paid the school district's general business tax but, because it had sustained operating losses between the years 1969-72, it filed with the Department of Collections of the City of Philadelphia for refund of the taxes for this period. The petition for refund was denied for the years 1969-71 but allowed for 1972 on the basis of the two-year statute of limitations set forth in the local tax collection law. The taxpayer, however, claimed that the department of collections was covered by a section of Philadelphia's code which provided for a refund of taxes within six years from the date of payment. The commonwealth court found that the controlling statute of limitations for filing petitions for the refund of a general business tax imposed by the school district was the two-year limitation contained in the state statutes rather than the six year limitation contained in the city code. The court found that the role of the department of collections was merely ministerial; that the legislature had established the position of tax collector within the structure of the school district rather than of the city.

In another Pennsylvania case the purchaser of property which had been sold at a tax sale appealed an order invalidating the tax sale.[62] The property at issue had been purchased by a resident of New Jersey in 1972. Taxes were paid in full through 1975 at which time the owner moved and as a result did not receive his 1976 school tax bill despite the fact that in paying his county and township taxes he circled in red the new address and included a note to the tax collector indicating the change of address. Failure to pay the 1976 school taxes led directly to a tax sale of the proprety in 1978. The property owner did not learn of the tax sale until 1980 and petitioned to have the tax sale invalidated on the ground that the notice of the tax sale was not marked "Personal Addressee Only" and therefore did not comply with the requirements of the Pennsylvania Real Estate Tax Sale Law.[63] The trial court invalidated the tax sale and appeal was taken to the commonwealth court. The court affirmed the trial court ruling, noting that the real estate tax sale law explicitly requires that tax sale notices be sent to "Personal Addressee Only," and that this provision must be complied with strictly. The court also ruled that the property owner's notice to the tax collector of his change of address established sufficient cause for invalidation of the tax sale.

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[60] *Id.* at 244.

[61] Bankers Bond & Mortgage Co. v. School Dist. of Philadelphia, 445 A.2d 1379 (Pa. Commw. Ct. 1982).

[62] Sabarese v. Tax Claim Bureau of Monroe Cty., 451 A.2d 793 (Pa. Commw. Ct. 1982).

The Court of Appeals of Texas affirmed a decision by a district court in a suit in which a taxpayer sought to avoid assessment of property taxes on grounds that they were excessive and discriminatory.[64] The district court ruled in favor of the school district. Upon appeal the taxpayer asserted twenty-two points of error. The appellate court affirmed the district court decision, rejecting all points of error raised by the taxpayer.

In a case decided by the Supreme Court of South Carolina taxpayers brought action seeking relief from the allegedly unconstitutional portions of various acts pertaining to the Marlboro County Board of Education.[65] One appellant also sought refund of property taxes levied by the board which he had paid under protest. One point at issue was whether a statute authorizing the governor to appoint members of the county board of education upon the recommendation of the county's legislative delegation violated the separation of powers provision of the state constitution. The court ruled that it did not. Also at issue was the question of whether the state constitution prohibited an appointed body from exercising the taxing power. The court found that article X, section 5 of the South Carolina Constitution prohibits taxation without representation. It noted that courts in other jurisdictions have held that legislative power to tax cannot be conferred upon a purely appointed body. Thus, it held that the general assembly could not delegate the power of taxation to an appointed body and ruled the act in question unconstitutional to the extent that it conferred arbitrary power to levy taxes upon an appointed board of education. It also ruled that the taxpayer who had paid the taxes under protest was entitled to a refund. The court commented:

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[63] 72 P.S. § 5860.602.

[64] Houston Lighting & Power Co. v. Dickinson Indep. School Dist., 641 S.W.2d 302 (Tex. Ct. App. 1982).

[65] Crow v. McAlpine, 285 S.E.2d 355 (S.C. 1981).

> The taxing power is one of the highest prerogatives of the General Assembly. Members of this body are chosen by the people to exercise the power in a conscientious and deliberate manner. If this power is abused, the people could, at least, prevent a recurrence of the wrong at the polls. However, where the power is reposed in a body not directly responsible to the people, the remedy is uncertain, indirect and likely to be long delayed. The unlimited power of taxation attempted to be conferred by the Act under consideration is itself a forceable reminder that the power to fix and levy a tax should only be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.[66]

6.2b Relationship of School Districts to Other Government Units

A dispute arose in Massachusetts as to whether the mayor of the City of Leominster had authority to reduce the budget requested by the school committee before submitting it to the city council.[67] Prior to 1980, school committees in municipalities other than Boston enjoyed fiscal autonomy. On December 4, 1980, the adoption of "Proposition 2½" limited the amount of money required to be appropriated for public schools to the amount authorized by the local appropriating authority. The school committee had approved a school budget of more than $10 million for fiscal year 1982. The mayor, who was chairman of the school committee, cast the only negative vote. The budget was then presented to the mayor with a request that he submit it to the city council. The mayor refused, however, recommending instead a reduced budget of $8.4 million, and suit was filed seeking a declaration that the mayor was required to submit to the city council the budget proposed by the school committee. The trial court ruled in favor of the mayor and plaintiffs appealed. The plaintiffs claimed that the mayor's failure to recommend the budget exactly as submitted by the school committee deprived the city council of an opportunity to consider and act upon the budget as proposed by the school committee, and also would have the effect of destroying the function of the school committee. The court rejected these contentions, noting that the statute was clear and explicit and that the school committee retained authority to determine expenditures within the total appropriation. The court noted that although it no longer had complete authority to determine its own budget, the school committee retained all of its other broad powers and responsibilities. The court concluded that the mayor had authority to reduce the budget submitted by the school committee before submitting the total city budget, including the amount proposed for school purposes, to the city council.

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[66] *Id.* at 358.

[67] Superintendent of Schools of Leominster v. Mayor of Leominster, 434 N.E.2d 1230 (Mass. 1982).

In another Massachusetts case the Boston Board of Education sought declaratory and injunctive relief against the City of Boston.[68] The mayor had refused to submit to the city council the school committee's request for a supplemental appropriation. Because the mayor had refused to submit its request for a supplemental appropriation to the city council, the board of education filed suit seeking to have the city required to fund the public schools for the full 180 day school year as required by a Massachusetts law. The city countered by seeking a declaration that the school committee must operate the public schools for 180 days within its statutory appropriation. The trial court determined that the city was required to operate its public schools for 180 days and ordered it to do so, notwithstanding the fact that the school committee's appropriation had been fully expended. The Supreme Judicial Court of Massachusetts agreed with the lower court. It also ruled, that the mayor may require the school committee to spend its funds at a rate which permits the city to meet its obligation to provide the minimum school year; that the city has authority to enforce the budgetary limitations; and that it may seek criminal penalties against school committee members who intentionally spend in excess of the committee's appropriation.

A federal district court in New York was requested by the Buffalo Board of Education to order the mayor and city council of Buffalo to provide additional funds for implementation of previously issued desegregation orders.[69] The school board had requested a budget of $162 million for 1982-83, the mayor recommended $150 million and the city council appropriated $150.6 million. The court, based on the extensive evidence presented, concluded that the funding provided by the city was insufficient to support the court-ordered desegregation program and directed the mayor and common council to make an additional $7.4 million available to the board of education.

6.2c Uses of Revenue

Two Pennsylvania school districts which were being merged with three other districts under a desegregation order sought to rebate surplus tax monies to their taxpayers.[70] The five districts were to continue in operation until June 30, 1981. On that date, as the last act before their dissolution, the board of the two school districts passed resolutions transferring any excess funds to special accounts from which "rebates" would be made to taxpayers. The actions were taken specifically to keep the funds from becoming the property of the new consolidated district. Plaintiffs contended that this action violated the federal district court's consolidation order. The court agreed with this contention and issued a permanent injunction to prevent the rebate of surplus tax monies, because such action would violate the court's consolidation order as well as state law.

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[68] Board of Educ. v. City of Boston, 434 N.E.2d 1224 (Mass. 1982).

[69] Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982).

[70] Hoots v. Commonwealth of Pa., 535 F. Supp. 1194 (W.D. Pa. 1982).

A Florida case involved the question of whether or not a school board was required to reopen negotiations for the purpose of negotiating salary increases for teachers when additional funds were furnished to the school board as a supplemental appropriation to the Florida Educational Funding Program.[71] The Palm Beach County Classroom Teachers Association appealed an order of the school board of Palm Beach County denying the association's request for an administrative hearing on the allocation and distribution of the supplemental appropriation. The appellate court held that the allocation and disbursement of the funds in question involved a modification of the agency's budget and therefore it was unnecessary for the board to provide the classroom teachers association with a hearing.

Further action occurred in a case involving the use of "Sixteenth Section Funds" in Louisiana.[72] The Tangipahoa Parish School Board deposited its Sixteenth Section Funds in the general fund but kept a record of how much revenue was produced by each ward and disbursed the funds exclusively to schools within the ward that produced them. The plaintiffs lived in a ward that did not contain sixteenth sections and sought to have the funds utilized for the equal benefit of all schools within the parish. The Louisiana Supreme Court ruled that Sixteenth Section Funds are to be placed in the current school fund and used for general school purposes. The court commented:

> 'General school purposes' is left to the discretion of duly elected school boards, but the policy of this board to disburse Section Sixteen funds to the wards that generated them is contrary to their discretionary use. The spending is not based on needs of parish schools, or general school purposes, but is based solely on the fact the funds were generated within a certain ward. This policy is inconsistent with that of R.S. 17:59 and 41:718, requiring funds to be spent on general school purposes.[73]

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[71] Palm Beach Cty. Classroom Teachers Ass'n v. School Bd. of Palm Beach Cty., 406 So. 2d 1208 (Fla. Dist. Ct. App. 1981).

[72] YEARBOOK 1982 at 233.

[73] Cacioppo v. Tangipahoa Parish School Bd., 404 So. 2d 945, 947 (La. 1981).

A writ of mandamus was issued directing the school board to credit all Sixteenth Section revenues to its general fund for the equal use and benefit of all schools within the parish.

School bus drivers in another Louisiana parish challenged the school board's allotment of its sale tax revenue.[74] The tax in question, a one percent sales tax to be used to supplement salaries of school employees, was approved in an election held for that purpose in 1968. Under the allocation formula adopted by the board, eighty-eight percent of the revenue was allocated to certificated personnel and twelve percent to noncertificated personnel. The bus drivers contended that the apportionment should be made on a pro rata basis according to each employee's base salary. The Louisiana Court of Appeals agreed that the proposition passed by the voters left the allocation of the proceeds of the sale tax to the discretion of the board and held that the board did not abuse its discretion by allocating eighty-eight percent of the proceeds to certificated personnel and twelve percent to noncertificated personnel.

A Pennsylvania school board's petition for authorization to issue general obligation bonds was denied by the trial court and the district appealed.[75] The district sought to issue general obligation bonds for unfunded debt. Pennsylvania's Local Government Unit Debt Act requires that an obligation be *due* and *owing* to issue general obligation bonds. The district's liabilities were primarily for teachers salaries earned over the course of the school year but to be paid in July and August after the close of its fiscal year. The trial court found that although the district did have a liability for teachers salaries, this amount would not be due until after the close of the fiscal year. Because the district had failed to establish the first prerequisite for authority to issue bonds, *i.e.*, that the obligations are indeed unfunded debt, the trial court's denial of the district's petition was upheld.

The voters in a Wisconsin school district had voted a tax in the amount of $25 thousand during the years 1966-73 for the purpose of constructing a swimming pool. In 1974 the accumulated funds were appropriated to a sinking fund dedicated to the construction of a pool and an annual levy of $25 thousand was continued for the years 1974-79. In 1979 and in 1980 the voters defeated proposals to issue bonds to raise the additional money needed to build the swimming pool. They also defeated a referendum seeking to transfer the swimming pool sinking fund monies to the district's general fund. A district taxpayer sought to have the monies declared "funds on hand" and applied to general expenses; the board of education wanted to use the funds for present and future capital expenditures other than a swimming pool. The district court dismissed the taxpayer's request for an injunction. The Court of Appeals of Wisconsin held that the voters at a school district's annual meeting are authorized to levy a tax for purposes of current or future capital expenditures without corresponding bonded indebtedness, and that unless the electors authorize the transfer of funds dedicated to the construction of a swimming pool, such funds are not available for any purposes other than constructing a swimming pool.[76] An injunction was granted restricting the board of education from using the fund for any purpose other than constructing the pool until the voters approved its use for other purposes.

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[74] Richland Parish Bus Drivers Ass'n v. Richland Parish School Bd., 420 So. 2d 696 (La. Ct. App. 1982).

[75] *In re* Board of School Dirs. of Fort Cherry School Dist., 442 A.2d 1259 (Pa. Commw. Ct. 1982).

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[76] Barth v. Board of Educ., School Dist. of Monroe, 322 N.W.2d 694 (Wis. Ct. App. 1982).

7

PROPERTY

Steven M. Goldblatt and Philip K. Piele*

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* Professor Piele wishes to acknowledge the assistance of Steven M. Pitt in the preparation of this chapter.

7.0 INTRODUCTION

With many school districts in this country still experiencing declining enrollments, cases involving citizen efforts to overturn school board decisions to close elementary and secondary schools again dominate this year's property chapter. And as in previous years, the courts without exception continue to uphold school board authority to close schools, transfer students, and sell or lease the buildings.

Ten cases dealing with detachment and attachment of school district land—nearly half of which are from Nebraska—are reported this year, continuing the trend in increased litigation involving school land transfer issues first reported in 1980.

Finally, this year's chapter includes a significant expansion in the reporting of building design and construction cases. Besides an increased coverage of cases involving competitive bidding, roofs and ceilings, design and performance, construction claims, and arbitration, new topics reported for the first time this year include construction funding, prevailing wages, and sales tax on materials. The expansion of the building and design section is due almost entirely to the efforts of Professor Goldblatt.

7.1 GENERAL SCHOOL BOARD AUTHORITY OVER SCHOOL PROPERTY MATTERS

In Pennsylvania, the Wallingford-Swarthmore school board granted permission for the erection of lights at its athletic field. Neighbors filed a complaint in equity to enjoin the board from having any work done on the lights. The trial court, after concluding that no nuisance would occur if the lights were erected, nevertheless imposed restrictions and conditions regarding their use. The commonwealth court vacated the decree. "When and if a nuisance in fact develops after the lights are erected and in use, of course, a court of equity can and should intervene."[1]

Another Pennsylvania school board attempted to impose a tax upon home building permits, in lieu of raising the real estate tax millage. The court found the levy to be "unreasonable" because of the exclusionary impact the measure would have against newcomers to the district. Although there was no evidence of conscious exclusionary intention by the board, the court found the effect of the tax to be against judicial policy as a matter of substantive due process.[2]

In New York, the Glens Falls school board voted to convert an elementary school to a middle school and provide for construction of a new addition. When the trial court annulled the resolutions, the board appealed. The supreme court, appellate division, ruled that city planning approval was not required, but an environmental impact statement was due prior to passage of the resolutions.[3]

In Louisana, the Franklin parish school board leased some land in exchange for the land being cleared and drained. The court of appeals found that the board failed to comply with either the public bid or lease law requirements of a performance bond and written specifications and declared the lease null and void, as well as entitling the lessee to recover its expenses for work done on the land.[4]

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[1] Board of School Dirs. v. Kassab, 450 A.2d 282 (Pa. Commw. Ct. 1982).

[2] Heisey v. Elizabethtown Area School Dist., 445 A.2d 1344 (Pa. Commw. Ct. 1982).

[3] City of Glens Falls v. Board of Educ., 453 N.Y.S.2d 891 (N.Y. App. Div. 1982).

A North Carolina school district abandoned the property for school purposes which had been granted to it and the district then attempted to sell the property. The heirs of the original grantor brought action claiming that the grant was of less than fee simple title and that they retained a right of entry for condition broken, since a clause in the deed provided that if the site were abandoned for school purposes it would first be offered for sale to vendor or his heirs. The trial court and the court of appeals agreed that the habendum clause, the granting clause and the warranty were consistent with an intent to pass fee simple title and a rule of construction required other clauses, repugnant to the conveyance, be rejected.

The court further held that even if the clause were given effect, it did not preserve a right of action for grantor's heirs since it did not give an unconditional right to re-enter or to bring action to terminate an otherwise fee simple estate.[5]

7.2 DETACHMENT AND ATTACHMENT OF LAND

A freehold board granted a petition for the transfer of land from one district to another in Nebraska. Two school districts appealed the transfer to the district court which reversed the board's decision after a hearing on the merits.

In their appeal to the state supreme court the appellants challenged the school district's standing in initiating the original suit. Although prior cases admittedly held that districts had no legal interest in maintaining district boundaries and hence had no standing, the school district argued that recent statutory changes must be read to infer such standing. The court disagreed, finding that the lack of pertinent and specific changes in the applicable law indicated a lack of legislative intention to effect such a change.[6]

The father of a student petitioned to transfer property from one school district to another. The board approved the transfer and the district court affirmed on the appeal of certain taxpayers.

The Nebraska Supreme Court was required, at the de novo trial, to determine whether all of the statutory requirements for transfer were complied with, and then whether the transfer was in the best educative interest of the child. The court affirmed the district court decision, holding that where the purpose is to keep the child in the same school district, with the same curriculum and the same assocations, the best educative interests of the child are being met by the transfer.[7]

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[4] Davis v. Franklin Parish School Bd., 412 So. 2d 1131 (La. Ct. App. 1982).

[5] Peele v. Wilson Cty. Bd. of Educ., 289 S.E.2d 890 (N.C. Ct. App. 1982).

[6] Hilbers v. School Dist. Nos. 26 and 94, 318 N.W.2d 265 (Neb. 1982).

When a freeholders board failed to act on a requested transfer of property from one district to another, the petitioner appealed to the district court which entered summary judgment granting the transfer. Taxpayers appealed to the Nebraska Supreme Court alleging that the statute which required that the districts "adjoin," means that the boundaries must touch. They argue that they do not touch in this case since they are separated by a river.

The supreme court held that although the term "adjoin" ordinarily means touching or having a common boundary, that it may also include a situation where the boundaries are separated only by a streambed which is not part of any district.[8]

Another Nebraska school district sought to transfer land to another district, not contiguous to the property. Taxpayers challenged the transfer, claiming that the applicable state statute concerning a "change of boundaries" should be interpreted to limit such property transfers to a contiguous district.

Reviewing other state statutes to determine the legislature's intent, the court found that the boundaries of school districts were not restricted to contiguous areas of land within one set of boundary lines. The transfer of land from one district to another is thus not limited by statute to land which is contiguous to the common boundary between the two districts.[9]

After the circuit court had affirmed a board of school trustees' decision to deny a petition for detachment and annexation, the Appellate Court of Illinois reversed the decision. The appellate court ruled that (1) the loss of revenue by a school district is not enough to prevent redistricting unless the maximum rates were being levied, (2) an alleged safety factor of unlighted streets was not supported by evidence, and (3) in every other respect the evidence clearly showed the people living in the area would benefit by granting the petition. The court emphasized that the social, recreational and business associations for the children and their parents would be disrupted by failure to approve the petition. As a result the court held that denial of the petition was reversible as "contrary to the manifest weight of the evidence."[10]

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[7] Hoffman v. Allen, 317 N.W.2d 91 (Neb. 1982).

[8] Schilke v. Walkenhorst, 316 N.W.2d 294 (Neb. 1982).

[9] Heartwell School Dist. R-4 v. Jepsen, 319 N.W.2d 68 (Neb. 1982).

[10] Granfield v. Regional Bd. of School Trustees of Bureau Cty., 439 N.E.2d 497 (Ill. App. Ct. 1982).

Residents of another Illinois district petitioned the regional board to detach property from the district and transfer the property to another district. The board granted the petition and the circuit court and appellate courts affirmed the decision on appeal.

The Illinois Supreme Court also affirmed, holding that the board had been justified in considering "whole child" and "community of interest" factors. The "whole child" concept means that the educational welfare of the children of the detached area would be improved through enlargement of their opportunities for participation in various community and school extracurricular programs. Closely related to this is the concept that the detachment area should share an identifiable "community of interest" with the district to be enlarged. The court also held that the regional board's consideration of a school board's announced decision to close one of its schools did not usurp the local board's function. Finally, the court dismissed the district's argument that it would lose substantial amounts of tax revenue, referring to prior case law holding that such loss alone would not prevent redistricting if the maximum rate is not being levied.[11]

The Michigan state board of education ordered the transfer of property from one school district to another without a vote by district electors. The plaintiff school district contended that the issue of detachment should be submitted to the voters even though a Michigan statute in "clear and unambiguous language" requires such a vote only if the valuation of the detached area is more than ten percent of the valuation of the entire district. Although the present transfer would be only 9.2 percent, the plaintiffs claim that a prior transfer of 8.4 percent must be added for a total of 17.6 percent of the district's valuation. The plaintiff school district argued that a literal reading of the statute would circumvent the legislative intent because "what cannot be accomplished directly in one large transfer, without approval of its electors, should not be permitted to occur indirectly through many small transfers."

Although a dissenting justice adopted this cumulative total approach to the ten percent statutory figure and referred to the legislative history of the statute, the majority found that the legislative intent was not clear enough to depart from the statutory language.[12]

After their request for a minor school district boundary change was denied by the district, the plaintiff property owners appealed to the South Dakota state superintendent who ruled in plaintiffs' favor. The district appealed to the circuit court which reversed the superintendent's decision.

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[11] Board of Educ. of Golf School Dist. No. 67 v. Regional Bd. of School Trustees of Cook Cty., 433 N.E.2d 240 (Ill. 1982).

[12] Owendale-Gagetown School Dist. v. State Bd. of Educ., 317 N.W.2d 529 (Mich. 1982).

Citing the court's limited scope of review in the appeal of an administrative decision, the Supreme Court of South Dakota held tha neither the circuit court nor the supreme court may substitute its judgment for that of the superintendent. The court reversed the circuit ruling, finding that there were no procedural due process errors at the d novo hearing conducted by the superintendent, that the findings of th hearing were substantiated by evidence in the record and that the dec sion was not contrary to law, clearly erroneous, arbitrary, capriciou or an abuse of discretion.[13]

A Texas district court held that the annexation of property by municipal school district from a neighboring district complied with th applicable statute covering the extension of school boundaries. Th court of appeals affirmed, ruling that the appellant's basic argumen that a required statutory procedure was not followed was based upo an inapplicable statute which was not legislatively intended to gover the extension of municipal school district boundaries. The court als noted that independent school districts had been determined to have n vested right in the territorial boundaries which were originall established, and that the state legislature maintains the authority t establish the means by which district boundaries may be changed.[14]

An Oregon property owner petitioned the district boundary board t have his real property transferred from one school district to anothe pursuant to state statute. The transfer was denied and the plaintiff property owner appealed to the Oregon Court of Appeals. That court hel that the board's decision was apparently based upon the testimon given by the superintendent, which was not included in the record. As result the court found that there was not substantial evidence in th record to support the board's finding and that it was not clear from th record that the board had applied the statutorily mandated criteri The case was remanded to the board for application of the appropriation criteria and a more complete and reviewable record.[15]

7.3 SCHOOL BOND REFERENDA

A resident citizen and taxpayer in a Texas school district brought su to enjoin the expenditure of bond issue proceeds voted for a specifi purpose. The state court of appeals reversed the district court decisio dismissing the suit for lack of standing.

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[13] Schumaker v. Canova School Dist. No. 48-1, 322 N.W.2d 869 (S.D. 1982).

[14] San Diego Indep. School Dist. v. Central Educ. Agency, 634 S.W.2d 50 (Tex. Ci App. 1982).

[15] Messer v. Polk Cty. Dist. Boundary Bd., 646 P.2d 1369 (Or. Ct. App. 1982).

The appellate court found that wher the voters have passed a bond relying upon a pledge the proceeds would go to a certain project, an injunction may be issued to prevent other use of the proceeds. This rule applies where the pledge is to purchase a particular site for the project and officials attempt to purchase another site. Regarding the plaintiff's standing, the court found that his status as either a resident taxpayer in a governmental district or a resident citizen of such district entitles him to bring suit to enjoin illegal expenditure of public funds.[16]

Plaintiff taxpayers sued a Texas school district to have a bond issue declared invalid. The trial court granted the school district's motion to require the taxpayers to post a bond to insure payment of any damages caused by the delay. When they failed to post the required bond, the district court affirmed the trial court decision, reversing the court of civil appeals decision.

The Texas Supreme Court held that the statutory requirements of such a bond and the authorization of dismissal of suit upon failure to post the bond, did not deny the taxpayers due process nor a right to trial by jury. The right to proceed with such a suit was found not to prevent taxpayers from assuming liability for damages caused by delay if the suit is proven unfounded.[17]

7.4 ZONING ISSUES

A Texas school district attempted to locate its bus-parking facilities within an area zoned residential. The city objected and refused to issue a required building permit on the basis of noncompliance with the zoning ordinance and an applicable nuisance ordinance.

The court of appeals affirmed the district court decision, referring to Texas Supreme Court precedent holding that school district authority predominates over the zoning authority of a municiplaity unless there is an unreasonable exercise of power or nuisance. The court went on to say that the authorized acts of a school district cannot be nuisances per se, nor may they be declared to be nuisances by the city. The remaining issue was whether the activity, which though not by its nature a nuisance, became so by reason of its locality, surroundings, or in the manner it was conducted. This question was submitted to jury by the district court and was decided in the negative.[18]

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[16] Devorsky v. La Vega Indep. School Dist., 635 S.W.2d 904 (Tex. Ct. App. 1982).

[17] Buckholts Indep. School Dist. v. Glaser, 632 S.W.2d 146 (Tex. 1982).

[18] City of Addison v. Dallas, 632 S.W.2d 771 (Tex. Civ. App. 1982).

7.5 BUILDING DESIGN AND CONSTRUCTION

7.5a Competitive Bidding

In 1977, a contractors' association won a permanent injunction i United States district court against the San Francisco school board fo requiring minority business enterprise participation to be awarded construction contract. This was found necessary to prevent a violatio of the state's competitive bid statute. In 1981, the board incorporate similar language in its standard bid documents, this time as a "goal" required of responsive bidders. The association promptly sought an orde from the court finding the board in civil contempt for failing to compl with the injunction. Not only did the court find the board in contempt it also required the board to pay the association's costs and attorney fees.[19]

The Supreme Court of Washington found that Ellensburg schoo district violated the state's competitive bid statute when it hired tw teachers as custodians to repaint a junior high school.[20]

In California, the Panama union school district opened bids for construction of an elementary school. The low bidder then found a clerica error of $100,000 and the district board rejected the erroneous bid When the project went out for bids five weeks later, the mistaken bidde was prohibited by state law from participating any further. Both th trial court and the court of appeals agreed that the rebid was barred.[21]

In Idaho, the Cassia and Twin Falls county school district improperly awarded a building contract "to a contractor who had listed a non qualified mechanical subcontractor in its bid." The court of appeal ruled that the lowest responsible bidder was entitled to recover the cos of preparing its bid, but was not entitled to a reasonable profi margin.[22]

In New York, the supreme court, appellate division, refused to allov Syracuse to enforce a bid on the construction of a junior high schoo which contained a $191,700 error.[23]

Scheyd, Inc., high bidder on a construction contract with a Louisiana school district, attempted to amend its bid, which if effective would have made it the low bidder. When the school district refused t

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19. Associated General Contractors v. San Francisco Unified School Dist., 544 F Supp. 845 (N.D. Cal. 1982).

20. Painting and Decorating Contractors v. Ellensburg School Dist., 638 P.2d 122 (Wash. 1982).

21. Colombo Constr. Co. v. Panama Union School Dist., 186 Cal. Rptr. 463 (Cal. Ct App. 1982).

22. Neilsen and Co. v. Cassia and Twin Falls Cty., 647 P.2d 773 (Idaho 1982).

23. City of Syracuse v. Sarkisian Bros., 451 N.Y.S.2d 945 (N.Y. App. Div. 1982).

award the contract to Scheyd, the latter was granted an injunction to prevent the district from granting the contract to Waddell, the low bidder.

The state supreme court held that Scheyd's attempted amendment was ineffective and that pursuant to a state statute, Waddell could recover attorney's fee resulting from the necessity of defending against the injunction—even though Scheyd ultimately withdrew the injunction voluntarily. The court's rationale was that injunctions are harsh remedies subject to potential misuse and the statute imposes on a party who improperly uses such an order, the responsibility to redress all damages, including attorney's fees connected with dissolution of the injunction.[24]

7.5b Construction Funding

In Nebraska, the Ord school board contracted for the construction of a high school addition to be "financed through a lease-purchase plan." A school district taxpayer sued the board to enjoin it from proceeding with its plan. Both the trial court and the Supreme Court of Nebraska ruled that the board was "authorized to enter into such a contract. . . ."[25]

The Pittsburgh school district sought two million dollars' reimbursement from the state department of education for construction of a junior high school addition. Because the district had failed to have the existing building appraised prior to construction of the addition, it was barred by the court from seeking reimbursement.[26]

7.5c Prevailing Wages

School construction has been the forum for much prevailing wage litigation the past few years.[27]

In Michigan, West Ottawa public schools challenged the state's prevailing wage law as an unconstitutional delegation of legislative power to the department of labor. The trial court agreed, but the court of appeals reversed. "The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality. The Department of Labor's determination of that prevailing wage does not amount to the setting of state policy."[28]

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[24] Scheyd, Inc. v. Jefferson Parish School Bd., 412 So. 2d 567 (La. 1982).

[25] George v. Board of Educ., 313 N.W.2d 259 (Neb. 1981).

[26] School Dist. v. Commonwealth, 437 A.2d 530 (Pa. Commw. Ct. 1981).

[27] *See* S. Goldblatt and R. Wood, *Financing Educational Facility Construction: Prevailing Wage Litigation*, NOLPE SCHOOL LAW UPDATE—1982 (1982).

[28] West Ottawa Pub. Schools v. Babcock, 309 N.W.2d 220 (Mich. Ct. App. 1981).

In New Jersey, the Teaneck board of education hired a mason for construction work on an auditorium and library. He brought an action against the board "on behalf of himself and others similarly situated to compel payment of the prevailing wage rate." The trial and appellate courts both concluded that "the Prevailing Wage Act is applicable only in favor of employees of contractors and subcontractors on public work projects and not in favor of permanent or temporary employees of public subdivisions which themselves undertake public work projects."[29]

7.5d Sales Tax on Materials

In Florida, builders of "relocatable classroom buildings" for the state department of education paid no sales tax on the materials used in the units. The state department of revenue, the trial court, and the Supreme Court of Florida considered the buildings to be "public works" within the meaning of the sales tax statute. Thus, the materials were taxable.[30]

7.5e Roofs and Ceilings

In New Jersey, the Cinnaminson school board sued the manufacturer of acoustical plaster containing asbestos installed in four schools' ceilings sixteen to twenty-one years earlier. As soon as the board discovered the potential health hazard, it had to remove and replace the plaster at substantial cost. On the manufacturer's motion for summary judgment, the United States district court ruled that the board's damages were recoverable on a theory of strict liability in tort, punitive damages were recoverable, and the six-year statute of limitations applied—measured from discovery of the danger.[31]

The Supreme Court of Virginia issued two roof case decisions the same day involving the Fairfax county school board. In the first, the court affirmed the trial court's ruling that the board's action against a roofing contractor was barred by a five-year statute of limitations, measured from the work's completion.[32] In the second, the court reversed the trial court, ruling that the board's action against another contractor on another school was not barred by the same statute, measured from issuance of the architect's certificate of final payment.[33]

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[29] Thomas v. Teaneck Bd. of Educ., 446 A.2d 547 (N.J. Super. Ct. App. Div. 1982).

[30] Housing by Vogue v. Department of Revenue, 422 So. 2d 3 (Fla. 1982).

[31] Cinnaminson Twp. Bd. of Educ. v. U.S. Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982).

[32] County School Bd. v. M.L. Whitlow, 286 S.E.2d 230 (Va. 1982).

[33] County School Bd. v. A.A. Beiro Constr. Co., 286 S.E.2d 232 (Va. 1982).

In Florida, the Seminole county school board sued the architect for improper roof design and construction supervision on three schools, all requiring "extensive repairs and eventual replacement." The trial court ruled that the four-year statute of limitations applied and that "the School Board discovered or should have discovered the design defects in the roofs more than four years before it filed its lawsuits." The court of appeals reversed because reliance on the architect "may reasonably have prevented the Board from discovering the permanency of the alleged design defects earlier."[34]

In New York, the Tri-Valley central school board brought an action against the architect for professional malpractice on an elementary school roof design. The supreme court, appellate division, reversed the trial court, ruling that the board's action was not barred by a six-year statute of limitations when measured from issuance of the architect's certificate of final payment.[35]

In New York, the Elmira school district contracted for the construction of a swimming pool building "to be a showplace" whose "design was intentionally dramatic." The district, under severe time constraints, accepted "permanently discolored" roof beams even though their appearance was "central to the aesthetics of the architectural scheme." Both the trial court and the supreme court, appellate division, found the beam supplier liable for the full cost of replacement—ten times the cost of mere repair.[36]

The New York City board of education solicited bids on a roofing rehabilitation contract and the lowest bidder was disqualified seven months later. The second lowest bidder brought an action against the board when it awarded the work to another contractor. Although the board acknowledged its error, both the trial court and the supreme court, appellate division, dismissed the proceeding "since it became moot when the work on the contract had substantially been completed."[37]

7.5f Design and Performance

The Central school district board sued the architects for improper design of an irreversible heat-pump system for its new junior high school. The supreme court, appellate division, reversed the trial court's dismissal of the complaint, ruling that it was "for the jury to decide whether the architects' conduct in designing the system was improper. . . ."[38]

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[34] School Bd. v. GAF Corp., 413 So. 2d 1208 (Fla. Dist. Ct. App. 1982).

[35] Board of Educ. v. Celotex Corp., 451 N.Y.S.2d 290 (N.Y. App. Div. 1982).

[36] City School Dist. v. McLane Constr. Co., 445 N.Y.S.2d 258 (N.Y. App. Div. 1981).

[37] Bush Terminal Roofing and Contracting v. Board of Educ., 457 N.Y.S.2d 114 (N.Y. App. Div. 1982).

In Tennessee, the Anderson county board of education sued the architect and mechanical subcontractor on a high school construction project for "damages based on theories of breach of contract, breach of warranties, negligence and gross negligence." On the architect's motion to remove the case to United States district court based on diversity of citizenship, the court found that the board had been "damaged by a single wrong—the high school was not properly constructed. That two contracts are involved does not mean that the actions are separate and independent. [T]herefore, this case is not removable. . . ."[39]

In a Missouri high school construction suit, the court of appeals noted that "the case was presented, perhaps of necessity, in confounding detail." The unpaid asphalt supplier sued the surety on the prime contractor's performance and payment bond, with the surety impleading the prime contractor and a group of indemnitors who in turn impleaded the asphalt paving subcontractor. The court affirmed the trial court's finding that the surety was liable to the supplier and the prime contractor was liable to the surety for prematurely releasing final payment to the subcontractor.[40]

7.5g Contractor Claims

The Supreme Court of New Hampshire affirmed an award of direct damages, but reversed an award of consequential damages when the contractor brought an action against Londonderry school district for its balance due on a high school addition construction contract. Recovery was denied for the contractor's loss of its credit line and ability to obtain bonding because such damages "were not reasonably foreseeable at the time of the parties' contract."[41]

In Tennessee, a contractor brought an action against the Gibson county school board to recover $34,000 interest earned on the retainage withheld from periodic payments under a school building contract. The court of appeals reversed the trial court, ruling that the board was not required to hold the contractor's retainage in escrow and invest the money for the contractor's account.[42]

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[38] 38. Board of Educ. v. Hueber, 456 N.Y.S.2d 283 (N.Y. App. Div. 1982).

[39] 39. Anderson Cty. v. Goodstein, Hahn, Shorr & Assoc., 535 F. Supp. 269 (E.D. Tenn. 1982).

[40] 40. School Dist. v. Transamerica Ins. Co., 633 S.W.2d 238 (Mo. Ct. App. 1982).

[41] 41. Salem Engineering and Constr. Corp. v. Londonderry School Dist., 445 A.2d 1091 (N.H. 1982).

The Pennsylvania department of general services awarded a construction contract for improvements at the Laurelton state school. After completing the work, the contractor filed a complaint with the board of claims to recover extra costs incurred for resilient tile flooring not in the contract. The board granted the department's motion for judgment on the pleadings, but the commonwealth court reversed and remanded as a question of fact.[43]

The Colorado Seminary executed a new lease with a tenant who then contracted for the remodeling of its rented offices. When the tenant became insolvent, the contractor filed a mechanic's lien claim against the premises. Both the trial court and the court of appeals ruled that the premises had been properly posted and the seminary was not a party to the contract, so the seminary was not liable to the contractor on its claim.[44]

The installer of a gymnasium floor brought suit in an Arizona court to collect payment from a high school. The high school counterclaimed, alleging defective materials and unsatisfactory workmanship. The supreme court upheld the lower courts finding regarding an apportionment of damages which left the parties in the same position as they had been prior to the lawsuit.[45]

A North Carolina contractor appealed from a lower court decision in favor of the board of education on the contractor's claim for extra compensation. The contractor had a written contract with the defendant school district to perform subcontracting duties on a school building project. Because of substantial delays which were not the contractor's fault, there were substantially increased expenses which provided the basis for this suit.

In reversing and finding for the plaintiff construction company, the court of appeals held inapplicable the district's defenses. These defenses were based upon the contractor's failure to follow certain contractual procedures including (1) a failure to provide timely notice of a claim for increased costs; (2) a failure to obtain a change order forincreased compensation; and (3) a failure to submit the claim to arbitration. In addition, the court found that the contractor had not waived his claim for extra compensation by accepting payment of the original contract price.[46]

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[42] Harrison Constr. Co. v. Gibson Cty. Bd. of Educ., 642 S.W.2d 148 (Tenn. Ct. App. 1982).

[43] H. B. Alexander & Son v. Commonwealth, 443 A.2d 424 (Pa. Commw. Ct. 1982).

[44] Uni-Build Corp. v. Colorado Seminary, 650 P.2d 1300 (Colo. Ct. App. 1982).

[45] Marston's Inc. v. Roman Catholic Church of Phoenix, 644 P.2d 244 (Ariz. 1982).

7.5h Arbitration

In Oregon, the Union county school district entered into a contract for the construction of a school building. All disputes arising out of the contract were to be arbitrated. During construction, "part of the structure collapsed, causing death to one worker, injury to four others, and a delay in the project." Claims were settled for the death and personal injuries, but the contractor later sought to arbitrate its claims for delay damages and indemnification. For a number of reasons, the trial court agreed with the district that the dispute was not arbitrable. The court of appeals reversed, thus sending the matter to arbitration.[47]

In New York, the supreme court, appellate division, ruled that where a contractor failed to timely file notice of its claim in compliance with a provision of the state education law, its claim was totally barred, even as an offset against a school district claim.[48] In Pennsylvania, the superior court ruled that all issues arising from a school district's agreement with an electrical contractor were arbitrable as originally agreed.[49]

7.6 SCHOOL CLOSURES

In response to a financial crisis, the Cincinnati school board voted to close Peaslee primary school, a predominantly black school located in the central city. For the five previous years, the board had "sought and received the advice of the citizens of the school district with respect to school closings and consolidations." Nevertheless, parents of black and Appalachian students at Peaslee brought an action against the board to enjoin the school's closing, alleging denial of equal protection, discrimination on the bases of race and national origin, and abuse of discretion. The United States district court denied the parents' motion because they "failed to establish a likelihood of success on the merits."[50]

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[46] Triangle Air Conditioning, Inc. v. Caswell Cty. Bd. of Educ., 291 S.E.2d 808 (N.C. Ct. App. 1982).

[47] Union Cty. School Dist. v. Valley Inland Pacific Constructors, 652 P.2d 349 (Or. Ct. App. 1982).

[48] *In re* Florida Union Free School Dist., 445 N.Y.S.2d 15 (N.Y. App. Div. 1981).

[49] Shamokin Area School Auth. v. Fairfield Co., 454 A.2d 126 (Pa. Super. Ct. 1982).

[50] Bronson v. Board of Educ., 550 F. Supp. 941 (S.D. Ohio 1982).

In Kansas, the Shawnee Mission school board decided to close Antioch elementary school in response to declining enrollment. A school district resident, who was not allowed to vote in the referendum election held on the closure issue, filed a petition seeking declaratory judgment that the state's school closing statute was unconstitutional. The trial court held the statute unconstitutional in part "as violative of the 14th Amendment to the U.S. Constitution" because it permitted only those registered voters in the particular school's attendance area to vote on school closings. The Supreme Court of Kansas reversed. "When a special interest election is involved the traditional standard of equal protection analysis is utilized. Such a standard requires only that classifications bear some rational relationship to a legitimate state end. [W]e hold it does."[51]

In Minnesota, the Duluth school board adopted a long-range facilities plan under which Morgan Park would be changed from a high school to a junior high school. A group of civic organizations, taxpayers, and parents successfully brought suit to permanently enjoin the board's action. The Supreme Court of Minnesota reversed the trial court, holding that "the realignments of students among the several school buildings in the district, so that the Morgan Park building continues to be used as a school but for junior high pupils rather than for both junior and senior high pupils, constitutes administrative acts which are not subject to review. . . ."[52]

In California, a citizens' association challenged the Burlingame elementary school board's decision to close certain schools, basing its suit on a statute requiring prior "community involvement." Both the trial court and the court of appeals found the statute inapplicable, holding "the statutory directions concern acts to be taken before sale or lease of excess school property. Because the instant suit—on its face—relates to neither, summary judgment was proper."[53]

In Florida, the Palm Beach county school board ordered the closure of an elementary school "that had not been cost effective for years" and two students' parents appealed. The court of appeals affirmed the board's decision. "There is nothing in the record to show that the decision-making was clandestine or sinister, or that the public meetings were shells into which non-public decisions were poured, or that the ultimate decision was anything other than the result of bona fide town meetings. [T]he ultimate decision appears to be the result of the board's concern for the quality of the children's education."[54]

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[51] Provance v. Shawnee Mission Unified School Dist., 648 P.2d 710 (Kan. 1982).

[52] Western Area Business and Civic Club v. Duluth School Bd., 324 N.W.2d 361 (Minn. 1982).

[53] Burlingame Citizens v. Burlingame Elem. School Dist., 185 Cal. Rptr. 306 (Cal. Ct. App. 1982).

In another Kansas case, the Marion county school board resolved to change the Florence attendance facility from grades kindergarten through eight by bussing grades three through five elsewhere. District patrons brought an action to enjoin the board from enforcing its resolution. The trial court granted the injunction, but the court of appeals reversed. "No consent is required from the resident electors to effectuate a change in use of an attendance facility, provided the school board contemplates continuance of any six elementary grades following the change."[55]

In Oregon, the Eugene school district voted to close Lincoln Community School, a central-city institution, for primarily fiscal reasons. A citizens' committee appealed the order of the land use board affirming the district's decision. The district cross-appealed the board's jurisdiction over its decision at all, and the court of appeals agreed. "The district board's decision was . . . an exercise of the school board's responsibility for educational policy and basic district management. Whatever secondary effects the closure of the school might have on land use, the closure decision was not a land use decision."[56]

In New York, the Webster school bord decided to lease an elementary school to Xerox for five years with the option to renew. Although the school was the district's most modern facility, it had served as such only for two years beginning six years after completion. District resident taxpayers brought an action to review the board's decision. Both the trial court and the supreme court, appellate division, dismissed the petition against the board. "The decision to close the school and reassign its students to another school was a question involving the exercise of professional judgment in a school matter. . . ."[57]

The New York City board of education declined to renew its four-year contract for educating handicapped students with Fairmont school due to financial mismanagement. The board then offered an alternative location for the majority of the students and sought placement for the rest. An affected student's parent brought suit to prohibit the school's closing. The supreme court found insufficient proof of the required irreparable injury to the students to warrant a stay.[58]

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54. Cortese v. School Bd., 425 So. 2d 554 (Fla. Dist. Ct. App. 1982).
55. Linnens v. Christensen, 646 P.2d 1141 (Kan. Ct. App. 1982).
56. Westside Neighborhood Quality Project v. School Dist., 647 P.2d 962 (Or. Ct. App. 1982).
57. Foster v. Saylor, 447 N.Y.S.2d 75 (N.Y. App. Div. 1981).
58. Cohen v. Board of Educ., 454 N.Y.S.2d 630 (N.Y. Sup. Ct. 1982).

A New York board of education, after discussion in executive session, voted to sell two schools that were closed as a result of enrollment decline. Two legal issues were raised by the petitioners. The first issue involved whether or not the board of education was required by statute to submit the terms of the proposed sale to the school district voters for approval. The court reviewed the legislative history of the statute to determine that, under the facts of this case, the board of education may sell any real property without referendum. The second issue was whether or not the board of education violated the open meetings statute in discussing the proposed sale and its conditions and terms in executive session. The statute allows executive sessions for the purpose of the sale or lease of real property where publicity would affect the value of the property. The court, without discussion, held that the facts support the board of education and that the open meetings law was not violated.[59]

7.7 HIGHER EDUCATION

In furtherance of a prime contract with the United States Department of Energy, the University of California subcontracted for the installation of a fire sprinkling system in two lab buildings. The subcontractor brought a diversity action against the university for breach of contract and the university moved to dismiss or stay pending compliance with the standard federal dispute resolution clause. The United States district court stayed the action, ruling that the subcontractor was "not entitled to seek relief in this court until it has complied with the contract's arbitration clause."[60]

Arizona taxpayers sought to enjoin expenditures by the board of regents for the installation of a new auditorium sound system. Money spent on the system originated from student fees; such funds were not "state money." Therefore both the trial court and the Supreme Court of Arizona found the taxpayers to lack standing.[61]

In Alabama, Jacksonville State University contracted for the construction of a military science building. A dispute over the contract arose and the university brought a declaratory judgment action against the contractor to establish its right to escrowed retainage funds. The supreme court reversed the trial court in ruling that the contractor was entitled to a jury trial.[62]

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[59] Botwin v. Board of Educ., 451 N.Y.S.2d 577 (N.Y. Sup. Ct. 1982).

[60] Grinnell Fire Protection Systems Co. v. Regents of Univ. of Calif., 554 F. Supp. 495 (N.D. Cal. 1982).

[61] Grant v. Board of Regents, 652 P.2d 1374 (Ariz. 1982).

[62] *Ex parte* Rush, 419 So. 2d 1388 (Ala. 1982).

In Missouri, Washington University sought condemnation of a landowner's property to expand its medical center. The landowner moved to dismiss the case for lack of jurisdiction and the university moved to enforce a settlement agreement between the parties. Both the trial court and the court of appeals agreed with the university.[63]

A student at the University of South Dakota brought a personal injury action against the state and the architect for negligent design of a dormitory stairwell railing some fourteen years earlier. The Supreme Court of South Dakota affirmed the trial court's ruling that the action was barred by a six-year statute of limitations when measured from the work's completion.[64]

A student was injured at the State University of New York at Albany when, at the entrance to a covered walkway connecting two buildings, she fell down stairs that were directly behind the doors. The trial court dismissed her personal injury suit against the state, but the supreme court, appellate division, reversed. "The uncontroverted expert proof is that it has always been considered to be a violation of acceptable engineering principles of good building design and construction, and hazardous and unsafe to have a door swing outward and over stairs."[65]

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[63] Washington Univ. Medical Center v. Komen, 637 S.W.2d 51 (Mo. Ct. App. 1982).

[64] McMacken v. State, 320 N.W.2d 131 (S.D. 1982).

[65] Burton v. State, 456 N.Y.S.2d 128 (N.Y. App. Div. 1982).

8

HIGHER EDUCATION

Robert M. Hendrickson

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8.0 INTRODUCTION

Nineteen eighty-two was a year which saw some interesting cases advance through the court system. Among these, one was a case dealing with the federal government's authority to regulate the retirement of state employees. Several cases now on the docket of the United States Supreme Court raised the question of whether financial aid makes a college a program under Title IX. The Supreme Court also dealt with the question of whether Title IX covered employment. Another case raised the issue of whether sex segregated mortality tables used in retirement plans violated Title XII. A new issue made its debut questioning whether the federal government had the authority to collect defaulted student loans. Questions of liability, whether athletic scholarship recipients should receive Workmen's Compensation, and whether the NCAA held a monopoly in the scheduling of telecasts of football games, round out another active year.

8.1 INTERGOVERNMENTAL RELATIONS

The question of federal authority versus state authority in the regulation of higher education is a continuing controversy. The Constitution reserves education as a prerogative of the states, but does not prohibit federal aid or regulation upon the receipt of federal financial assistance. A case on state and federal powers which could have significance for higher education was one dealing with whether the federal interest under the commerce clause was larger than those powers reserved to the states under the tenth amendment, thus allowing the federal government to regulate retirement policies for state employees. In a Wyoming case now on the docket of the United States Supreme Court and argued on November 4, 1982,[1] the state of Wyoming alleged that the Age Discrimination in Employment Act as applied to state employees violated the tenth amendment to the United States Constitution. The Equal Employment Opportunities Commission sued the state of Wyoming for discriminating on the basis of age in setting mandatory retirement for law enforcement officials at age fifty-five. The district court found that *The National League of Cities v. Usery*[2] applied here. The federal government's regulations under the commerce clause must loom larger as a national interest when balanced against the defendant's nominal interest in discriminating on the basis of age. The court saw the federal government's policy of age discrimination with foreign service and law enforcement employees as giving any national interest argument a hollow ring. They found that the Age Discrimination Act did not apply to game wardens because of the state's defined powers under the tenth amendment.[3] The *National Cities* case specifically covers police protection, sanitation, public health, and parks and recreation. Whether this opinion can be extended to tenured faculty depends upon the ruling in the current case by the Supreme Court and future litigation involving higher education. Moving the retirement age of tenured faculty to seventy, as the federal regulation could do, would have severe economic and eductional implications for institutions of higher education. According to the *United States Law Week*, oral argument indicated a leaning by the Justices toward the Wyoming position.[4]

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[1] EEOC v. Wyoming, Docket No. 81-554, 50 U.S.L.W. 3527 (Jan. 12, 1982).

8.2 EMPLOYEES

Litigation involving questions of employment was voluminous. This reflects both the financial condition of higher education and the shrinking job market. The employee cases have been organized under several broad topic areas. First, were complaints alleging discrimination under various federal regulations (Titles IX and VII, The Equal Pay Act, Age Discrimination, and 94-142) and in hiring. Second, were complaints involving nontenured faculty. Third, were complaints from tenured faculty, and finally, cases concerned with collective bargaining.

8.2a Discrimination

After a number of years of litigation at the circuit court level, the United States Supreme Court finally agreed to hear a case involving the question of whether Title IV covers employment. Title IX prohibits gender discrimination in educational programs or activities receiving federal financial assistance. In *North Haven Board of Education v. Bell,* the issue was whether Congressional intent in passing Title IX of the Education Amendments of 1972[5] included discrimination in employment. This case consolidated two cases at the Second Circuit Court of Appeals involving the North Haven Board of Education and the Turnbull Board of Education. The district court in both cases found in favor of the female plaintiffs and ruled that the school boards had discriminated on the basis of sex in violation of Title IX and subpart E[6] of the regulations. The Second Circuit upheld the lower court opinions.[7]

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[2] 426 U.S. 833 (1976).

[3] EEOC v. State of Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).

[4] 51 U.S.L.W. 3273 (Oct. 12, 1982).

The school boards on appeal have asked that subpart E be declared outside the scope and intent of Title IX. The court through an analysis of the legislative history and post enactment history including congressional review of the regulations found that subpart E was within the scope of Title IX. Congressional intent was to include employment in "specific programs" receiving federal financial assistance. In further elaboration, the court ruled that the statute and regulations were program specific, applying only to those programs receiving federal financial assistance.[8]

While clearly opening up Title IX to discrimination in employment, the case left unanswered the definition of the scope of the program specific provisions of the statute and what constitutes federal financial assistance. Two cases concerning these two issues have been decided subsequent to the *North Haven* decision and illustrate the continuing controversy. One of these cases is now on the docket of the United States Supreme Court. In a Virginia case, a private institution asked for injunctive and declaratory relief to stop an investigation by the Department of Education's Office of Civil Rights (OCR). OCR based its authority to investigate the institution's athletic programs on the receipt of a $19 hundred library resource grant. They maintained that the institution was a program within the meaning of the statute. The University of Richmond maintained that OCR's authority went only to programs receiving direct financial assistance and that their athletic program received no federal financial assistance. Citing the *North Haven* decision, the district court ruled in favor of the institution.[9] The Justice Department elected not to appeal this case.

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[5] 20 U.S.C. § 1681 *et seq.*

[6] 34 CFR § 106.1 *et seq.* § 106.51-106.61.

[7] North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980).

[8] North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).

[9] The University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982).

In a Pennsylvania case, students brought suit against the United States Department of Education (DOE). The department had withdrawn Basic Education Opportunity Grants (BEOG) and Guaranteed Student Loan (GSL) funds after the college had refused to file an assurance of compliance in accordance with the Title IX regulations. The federal district court had ruled that the regulations on Title IX were invalid and granted summary judgment to the college. The appeal to the Third Circuit Court of Appeals by DOE resulted in reversal of the district court position.

The Third Circuit reviewed the question of whether indirect financial aid in the form of BEOG's and GSL's constituted federal financial assistance within the meaning of Title IX. They concluded that both financial aid programs constituted federal financial assistance. Further, since the money was dispersed throughout the college, the college was a "program" receiving federal financial assistance. Therefore, it was within the authority of DOE to require this institution to complete an Assurance of Compliance form. Failure to complete the Assurance of Compliance form allowed DOE to remove BEOG and GSL grants from students attending the college.[10] They also ruled that the department would not be required to give students a hearing at the time of termination. If this ruling is upheld by the Supreme Court, any educational institution whose students receive federal financial assistance becomes a "program" within Title IX. All hiring within the institution thus comes under the prohibitions of gender discrimination.

This controversy over the meaning of program specific and federal financial assistance is before the Supreme Court in a case consolidated from the above case and two other cases reported in last year's volume of the *Yearbook*.[11] A decision will be forthcoming.

8.2a(2) Title VII

Title VII of the Civil Rights Act of 1964[12] prohibits discrimination in employment. A number of cases concerning discrimination in employment have been decided. Several of these cases dealt with the "shifting burden of proof" at trial. Another dealt with time limits within which charges can be filed, while one dealt with discrimination in the awarding of fringe benefits. One other case defined the limitations to the award of back pay where discrimination is charged.

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[10] Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982).

[11] *See*, THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 225, Haffer v. Temple Univ., 688 F.2d 14 (3rd Cir. 1982) and Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981).

[12] 42 U.S. § 2000e.

The burden of proof in Title VII shifts from plaintiff to defendant and then back to the plaintiff. In a case involving Brown University, the First Circuit Court of Appeals clearly outlined the procedures for review of Title VII cases. The court noted that first the burden of proof rests with the plaintiff to establish a prima facie case of discrimination. Once the plaintiff meets this obligation, the burden then shifts to the institution to show that the facts and rationale for an employee decision were not motivated by sex discrimination. If the institution meets that burden, then the burden shifts back to the plaintiff to show that the rationale offered was simply a pretext to justify discrimination on the basis of sex. In this case a female alleged discrimination based on sex in her nonpromotion, nonappointment to an editorial board, and the award of salary. The court noted that alleged discrimination prior to enactment of Title VII could not result in litigation, but it could be considered by the court as being demonstrative of a pattern of illegal conduct. In this case, the univrsity was able to provide an adequate rationale for its actions against this employee, including the use of market value factors in arriving at salaries. The university also used her poor publication record as a rationale for her nonpromotion and for not equalizing salaries between the plaintiff and her colleagues.[13]

In another case involving a female faculty member alleging discrimination, the court again noted the shifting burden of proof. The court noted that statistical anlysis, while important, is not the sole criteria in showing the existence of a prima facie case of discrimination. The university was able to present reasons such as plaintiff's failure to meet the university's standards for scholarship and research as adequate to justify the nonpromotion decision.[14]

The time limit for filing a charge under Title VII is 300 days. In a Wisconsin case, the court ruled that the plaintiff was within the time limit, even though the institution's policy clearly stated that the academic dean's notice was the official notice of dismissal. The court stated that the structure of the tenure procedure was such that the chancellor's role appeared to be decisive even though the prior decision by the dean was labeled official. Therefore, the professor met the time limit even though he waited more than 300 days after the official notice for the chancellor's decision before filing.[15]

Sex discrimination through the assessment and awarding of fringe benefits to employees is one which received attention this past year. A

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[13] Lampher[illegible] v. Brown Univ., 685 F.2d 743 (1st Cir. 1982).

[14] Laborde v. Regents of the Univ. of Calif., 686 F.2d 330 (9th Cir. 1982).

[15] Carpenter v. Board of Regents of the Univ. of Wis. Sys., 529 F. Supp. 525 (W.D. Wis. 1982).

Wayne State University case dealt with the issue of whether insurance companies can use sex segregated mortality tables to calculate the size of employees' monthly annuity payments after retirement. The university offered its employees Teacher Insurance and Annuity Association (TIAA) and College Retirement Equity Fund (CREF). Under these two policies, a female retiree received a smaller annuity check than a male based on the actuarial probability that women live longer.

The circuit court found that TIAA and CREF were not employees but rather contracting insurance companies. However, the university could not be insulated from the discriminatory actions of the insurance company and would be held culpable. They ruled that the use of sex segregated mortality tables to determine annuities of retirees did not violate Title VII as long as the total actuarial value is equal for similarly situated men and women. They noted that in fact gender neutral tables would not equalize the treatment of men and women since the university would have to contribute more to the women's retirement fund and they would receive more total actuarial amount if they lived to their predicted statistical age. They differentiated this case from *City of Los Angeles v. Manhart*[16] which required "men and women to make unequal contributions to an employee-operated pension fund."[17] The Wayne State case did not contain such a contribution plan.[18]

The issue of the award of back pay where discrimination was alleged under Title VII was raised in an Ohio case. The court noted that back pay should not be awarded where the professor was making more money in private practice than he would have made as a faculty member. The court noted that the case law indicates that back pay is not allowable where subsequent wages are at or exceed the wages he would have received if he had not been discriminated against. The court also noted that compensatory and punitive damages are not allowed under Title VII.[19]

8.2a(3) Equal Pay Act

The question of whether a suit against the state under Title VII and the Equal Pay Act was blocked by the immunity prerogatives of the eleventh amendment was an issue raised by a University of Maryland case. A faculty member brought a suit alleging discrimination in pay. In court, the university moved to have the case dismissed, arguing that the eleventh amendment barred this suit. The court found that intent of Congress was clearly to bypass the immunities prerogatives of the eleventh amendment and allow private parties to sue in discrimination cases under Title VII and the Equal Pay Act.[20]

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[16] 435 U.S. 702 (1978).

[17] *Id.* at 717.

[18] Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982).

[19] Adler v. John Carroll Univ., 549 F. Supp. 652 (N.D. Ohio 1982).

In another case, a female faculty member relied on the university's regression analysis model to show a violation of the Equal Pay Act. The regression analysis model showed that forty-nine percent of the males were overpaid, while only thirty-one percent of the females were overpaid. These percentages, according to the analysis, have "less than eight chances in 10,00 of occurring by chance." The court held that a regression analysis model alone could not be relied on to reach a finding of pay discrimination. The statistical analysis must be further supported with expert testimony as to its reliability. The burden of proving the reliability of the regression analysis model falls on the plaintiff. Since she failed to support the validity of the model with adequate expert testimony, she did not meet her burden of showing that women were discriminated against in compensation.[21]

8.2a(4) Age Discrimination in Employment Act of 1967[22]

One case in this area deals with "equitable tolling" or waiving the time limit within which one can file a complaint. A fifty-six year old medical professor alleged age discrimination in salary adjustments, available secretarial assistance, and fringe benefits when he was compared to faculty under forty years of age. He filed his charges on December 23, 1980, more than 180 days after the last alleged violation which occurred on June 25, 1980. In taking up the question of "equitable tolling," the court found that the plaintiff could not rely on awaiting the outcome of a grievance procedure as a rationale for waiving the waiting period. Since the plaintiff had no reason to expect that the grievance procedures would automatically turn out in his favor, he should have simultaniously pursued other legal remedies. The court noted that tolling would have been allowed if it could be shown that the discriminatory action or its effects continued beyond the date of the last discriminatory act. The plaintiff failed to make such a showing. The university's motion to dismiss was, therefore, granted.[23]

In Georgia a sixty year old university bookstore clerk charged that her position as a cashier was downgraded to a part-time position because of her age. The university filed three motions to dismiss. On the first motion, the court found that the tenth amendment did not bar a suit by a private party nor did Congress exceed the commerce clause powers of the federal government in allowing the Age Discrimination Act to apply to state agencies. Further, the eleventh amendment did not provide immunity since the state statutes governing the board of regents give it the power to sue and be sued in any court of law, a position clearly upheld by the Georgia Supreme Court. However, the court dismissed the plaintiff's suit against the individuals, noting that the Age Discrimination Act does not make an individual personally liable. However, those persons in their official capacity should be named in the suit against the corporate entity. Ultimately, the court dismissed the charges since the plaintiff failed to seek informal administrative remedy through the Secretary of Labor, as the law provides, prior to litigation.[24]

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[20] Bickley v. University of Maryland, 527 F. Supp. 174 (D. Md. 1981).

[21] Wilkins v. University of Houston, 662 F.2d 1156 (5th Cir. 1981).

[22] 29 U.S.C. § 621 *et seq.*

[23] Sanders v. Duke Univ., 538 F. Supp. 1143 (M.D.N.C. 1982).

The final case involved both the Age Discrimination Act and Title VII racial discrimination. The case is unique in that a Missouri college formerly under the Saint Louis Board of Education was transferred to the state college system. In the transfer process, all employment at the college was terminated and applications were taken to fill all positions. The plaintiff at forty-seven years of age applied for a tenured associate professor's position, having held a tenured position with the college under the Saint Louis Board of Education. When not hired, he charged that hiring a thirty year old nontenured faculty member and a sixty-two year old black tenured faculty member constituted discrimination on the basis of age and race.

The court found that this claim under the Age Discrimination in Employment Act was valid since the institution's reservation of some positions for nontenured faculty had a "disparate impact" on tenured faculty over forty years of age. The institution's defense of "economic savings" was inadequate as a defense in a prima facie case of "disparate impact." Further, the court found discrimination on the basis of race under Title VII of the Civil Rights Act of 1964. The plaintiff was able to show that the rationale for his employment decision was a mere pretext for discrimination on the basis of race. In every case where a qualified black and an equally qualified white were interviewed for a job the black was hired, indicating that race was the key factor upon which employment decisions were made. The court ordered the institution to award the plaintiff a tenured position. Back pay was denied since his salary during the interim was slightly higher than what he would have received at the institution. The court noted that plaintiff's property interest was not transferred when control of the college was transferred to a new board.[25]

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[24] McCroan v. Bailey, 543 F. Supp. 1201 (S.D. Ga. 1982).

[25] Leftwich v. Harris Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).

8.2a(5) Rehabilitation Act of 1973[26]

While no cases specifically dealt with higher education, one case could have future significance for discrimination of handicapped in employment. The Third Circuit Court of Appeals held that sections 504 and 505 of the Rehabilitation Act of 1973 covered discrimination of handicapped individuals employed by federal contractors or by organizations receiving federal financial assistance. The case was remanded to the district court for determination on the merits.[27]

8.2a(6) Hiring Discrimination

A number of cases involving discrimination dealt with the hiring process. While these cases could also be included under other sections, they were selected for presentation here because they deal with specific procedures in the hiring process which administrators and legal counsel should consider in designing a search.

In the first case, a black female brought suit alleging discrimination in the selection of an accounting lab assistant at a community college. The plaintiff held a Bachelor of Science degree in economics and had taken four accounting courses as an undergraduate. The person hired for the position, a white female, had completed a two year accounting program at the school, had advanced accounting courses, and was already employed as a lab assistant in the evening program. The Fourth Circuit Court of Appeals overturned the lower court decision which found discrimination in hiring. In reviewing the shifting burden of proof, the court found that the critical question is whether the plaintiff was better qualified than the person hired. The record showed that the plaintiff was not as qualified as the person hired. The court noted that under cross examination the plaintiff showed a lack of knowledge of double entry accounting and that the person employed had a greater knowledge of the job. The plaintiff failed to show that the rationale for selecting the other candidate was a pretext for discrimination.[28]

In another case several female faculty members brought a class action suit alleging discrimination on the basis of sex. One charge concerned the selection of the head of the department of health, physical education and recreation when the male hired had been introduced as the new head at a luncheon prior to announcing the vacancy. Also, the female candidate appeared to have superior qualifications. Another charge concerned the new director of educational experience where a female candidate alleged that she held superior credentials compared to those of the new director and that the job qualifications of math and statistics were a pretext for discrimination. Several other faculty charged harassment by the new health, physical education and recreation department head.

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[26] 42 U.S.C. § 2000(d) *et seq.*

[27] LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982).

[28] Lewis v. Central Piedmont Commun. College, 689 F.2d 1207 (4th Cir. 1982).

The court found that discrimination had clearly taken place at the institution. The record showed the female applicants to be more qualified than the persons hired. The job description written for the director of educational experience contained no functions which required math and statistics. The male faculty member did not need to become the director to develop new math courses, his area of expertise. The court awarded the females back pay of what they would have received had they been selected as the department head and director. An award of adjusted compensation was made where discrimination in compensation had been proved. Finally, negative information was expunged from a personnel file where it was apparent that the information was being used as retaliatory action arising out of this complaint.[29]

In the final hiring case, a white male applicant for the assistant editor of a university alumni magazine charged he was discriminated against as a result of a memorandum sent by the affirmative action officer. The memo sent after the editor had placed the plaintiff first and a black female second in his hiring priority list reminded the editor of the institution's affirmative action plan and the importance of the qualification of familiarity with the institution on which the second candidate was better qualified. In a compromise, the editor tried to hire both top candidates on a part-time basis. Only the white candidate accepted and after a month of work the editor began to feel that the white candidate, who possessed substantial journalistic experience, was overqualified for this position. The editor reordered the priorities of the candidates, making the white applicant number four and hired someone else. The court found that overqualification for the position and lack of familiarity with the institution to be legitimate nondiscriminatory reasons for selecting another applicant.[30]

8.2b Nontenured Faculty

The amount and scope of litigation in the nonrenewal of an untenured faculty member's contract is ever increasing. These cases continue to be concerned with two areas: (1) removal based on first amendment protected speech and (2) procedures for nonrenewal.

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[29] Greer v. University of Ark. Bd. of Trustees, 544 F. Supp. 1085 (E.D. Ark. 1982).

[30] Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981).

8.2b(1) First Amendment Freedom of Speech

Freedom of speech under the first amendment is viewed as a fundamental right. Faculty members have the right to be protected from removal from their position or denial of tenure based on speech covered by the constitution.

In a Texas case the director of research sued claiming that the sole reason for his denial of tenure was protected speech under the first amendment. The director had spoken out publically concerning improprieties in the use of research funds. At one point his immediate supervisor informed him that his job was in jeopardy if he continued to make these pronouncements. The district court found that the plaintiff's first amendment rights had been violated when his pronouncements became the sole reason for denial of tenure. They awarded damages consisting of attorneys' fees and back pay. The Fifth Circuit Court of Appeals affirmed the portion of the district court decision, finding that this first amendment rights had been abridged. The institution could not show any rationale other than his pronouncements which resulted in the nontenure decision. Charges that he was disruptive were not substantiated and really went to the unsettling nature of his pronouncements. However, the circuit court did not find that the officials of the institution acted maliciously, but rather that they had acted in the best interests of the institution. Therefore, they would not assess damages against the officials. They also disallowed the back pay award, since there was no clear indication that Texas statutes waived sovereign immunity under the eleventh amendment. State statutes clearly made the institution a state agent, bringing it within the immunity prerogatives of the eleventh amendment. The court, therefore, reversed the award of back pay, but allowed the award of attorneys' fees.[31]

In another Texas case, a faculty member claimed his first amendment rights were violated when he allegedly was denied tenure for refusing to change the grade of a student. The district court found his first amendment rights had been violated. The Fifth Circuit Court of Appeals reversed, stating that the district court erred in not looking beyond the first amendment violation to other reasons for nonrenewal. The court, based on precedent, ruled that a first amendment violation does not prevent nonrenewal if the record shows that nonrenewal would have taken place anyway. In this case, the university adequately showed that sound reasons such as inadequate performance of job responsibilities resulted in nonrenewal, not first amendment speech.

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[31] United Carolina Bank v. Board of Regents, 665 F.2d 553 (5th Cir. 1982).

The record aslo showed abusive and uncooperative behavior to others used as another reason for the decision to terminate.[32]

In a third case, a community college nontenured faculty member was terminated at the end of her contract period. This faculty member was repeatedly outspoken concerning various curricular and schedule matters. Her supervisors at trial testified that her nonrenewal was based on her uncooperative attitude as evidenced by her pronouncements. The district court ruled and the Fourth Circuit Court of Appeals affirmed that her first amendment rights had been violated since her nonabusive but controversial pronouncements were the sole reason for her dismissal.[33]

8.2b(2) Nonrenewal Procedures

In the area of nonrenewal of a nontenured faculty member's contract, one case indicates the controversies within which an institution can become embroiled in the process of dismissal. This case goes back to the 1970-71 academic year when a nontenured faculty member was offered a contract but was notified that it was terminal. The court labeled this the "nonrenewal decision." That same year after becoming involved in a scheduling problem and refusing to hold his classes, the faculty member was given several warnings and then dismissed at midterm. The court labeled this the "dismissal decision." A series of very complicated litigations over eleven years involving the full federal court system followed. The district court found his current contract gave him a property interest and required due process in the "dismissal decision" and that under the school's policy, due process was required in the "nonrenewal decision." In 1977 he was reinstated to his faculty position, attorney's fees were paid, and procedures were commenced to provide him with due process as ordered by the court. The committee on professional affairs held hearings concerning the "nonrenewal decision." They found his contract was not renewed for reasons violative of academic freedom and recommended his reinstatement. The president withdrew the nonrenewal letter and immediately relied on the "dismissal decision." The same committee held hearings in which the professor refused to participate and recommended dismissal. Post committee briefs were filed and a hearing was held before the board of trustees with testimony from the professor's attorney. His official dismissal was approved.

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[32] Hillis v. Stephen F. Austin State Univ., 665 F.2d 547 (5th Cir. 1982).

[33] Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982).

The Third Circuit Court of Appeals ruled that state law would govern whether a state could be sued in its own court. However, immunity through the eleventh amendment must be clearly and precisely waived. The executive branch or legislative branch has the appropriate authority to make such a waive. If the judicial branch waived immunity, while not the most appropriate method, it must be very precisely stated by the court. Since Pennsylvania has not waived immunity, the faculty member does not qualify for damages. The court ruled that the new hearing procedures were fair and provided due process.[34] The court, in summary, with a certain amount of consternation, stated: "We continue to hope that the same spirit of light, of liberty, and of learning which we believe characterizes places of higher education applies not only to faculty and student learning and research, but also to the relations between faculty and administration."[35]

In a case involving the promotion criteria for nontenured faculty, the court ruled that the promotion criteria did not become part of the binding contract. The Supreme Court of Oklahoma held that the board of regents had the authority to change the promotion policy and apply it to those not yet promoted.[36]

In a Maine case, a faculty member's drinking problem was discussed at several closed meetings to decide whether to grant tenure. While the drinking problem was only a secondary reason for not granting tenure, its presentation at a private meeting did not implicate the faculty member's liberty interest because of defamation of character. The court stated that the nature of the tenure decision and its consequent job security should allow the institution access to "the exercise of subjective judgment, confidential deliberation and personal knowledge of the candidate."[37]

However, the confidential deliberations cited by one circuit court were breached in a potential discrimination case in another circuit court. In this case a black faculty member was denied tenure. In order to pursue a civil rights claim, he filed a motion to compel discovery of the votes of two members of the promotion and tenure committee. While the trial court denied his motion, the Second Circuit Court of Appeals ruled that the lower court erred in denying the motion to compel discovery. On balancing the need for disclosure to bring forward a charge of discrimination against the need for confidentiality to protect academic freedom and peer review, the court found that in the absence of reasons for the denial of tenure the balance shifts to the plaintiff's need for discovery.[38] When a charge of discrimination in nonrenewal of a nontenured faculty member is present, the institution appears to have two options: They can either provide reasons for nonrenewal or face a court action to compel discovery of aspects of the peer review process.

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[34] Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142 (3rd Cir. 1982).

[35] *Id.* at 115.

[36] Randolph v. Board of Regents of Oklahoma Colleges, 648 P.2d 825 (Okla. 1982).

[37] Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981).

Finally, an administrator who was notified that his seventh contract was terminal did not have a proprty interest. Since he was in a nontenured position, he had no reasonable expectation for reemployment. The fact that he was given a full year to find a job aided in diminishing any liberty interest, property interest and resulting due process claim.[39]

8.2c Tenured Faculty

The issues involving the rights of tenured faculty have resulted in a number of litigations. These cases can be subdivided into several areas, including, termination of employment for cause, awarding of salary increases, denial of privileges associated with the position, and removal due to a financial exigency or program elimination.

8.2c(1) Termination for Cause

A number of cases have been decided in this area. Two have been selected because of their unique facts. Three other cases are concerned with procedures utilized during removal for cause.

In an Arkansas case, the dean of instruction at a community college was removed after he made public pronouncements concerning the administrative skills of the president. He refused, however, to bring these charges to the attention of the board and refused to supervise a faculty member under his control and he acted in an angry and abusive manner to the president and others. The president commenced an action for dismissal, charging unbusinesslike conduct and insubordination. At a hearing before the board, the dean of instruction was not allowed to present witnesses who could testify concerning the president's alleged incompetence. The plaintiff alleged that his first amendment rights had been violated since his termination was the result of protected speech. He also claimed violations of his due process rights when the board refused to hear the plaintiff's witnesses. The court found that the dean's first amendment rights were not violated since he was not dismissed for what he said but the manner of his pronouncements. The record clearly showed that he expressed himself in a hostile manner and resorted to threats of physical violence. The court stated that there is no constitutionally protected right to express oneself in an unbusinesslike or unprofessional manner. The court also held that the hearing committee was only required to hear tstimony about the dean's action and attempts to present witnesses to address the president's job performance were appropriately disallowed.[40]

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[38] Gray v. Board of Higher Educ. CUNY, 692 F.2d 901 (2nd Cir. 1982).

[39] Harrison v. A. B. Ayers, 673 F.2d 724 (4th Cir. 1982).

In a Washington case, a tenured faculty member, who had been reprimanded for being absent from the institution several times, ignored a specific directive and was absent at the beginning of the semester from the institution for an extra day while giving a speech in Israel. He was dismissed immediately on charges of insubordination. The board, after a hearing, approved the dismissal. The faculty member charged violation of his due process and first amendment freedom of speech rights. The court ruled that the first amendment was not implicated since the reason for dismissal was based on his conduct, not his speech. The court ruled that due process had not been violated nor was the dismissal viewed as excessive punishment because of a history or misconduct.[41]

In another case, conditions in the contract determined the court's decision. A faculty member, who was hired with a written agreement that he would automatically receive tenure in his third year, was notified that his second year contract would be terminal. The court found that his contract granting automatic tenure gave him a property interest requiring due process before termination.[42]

Procedures concerning release of the names of witnesses who will testify against a faculty member was the key issue in another case. A member of the music department faculty was notified of the charges against him, was given a hearing and was terminated for allowing students to consume alcohol and marijuana on a school-sponsored trip. The professor failed to request the names of the witnesses who would testify at the hearing against him. He filed suit alleging that his due process rights were violated when he was surprised by the testimony of witnesses which was not reflected in the charges, therefore, inhibiting his ability to defend himself. The court found that the charges against him were sufficient. They also ruled that by the contract he had a responsibility to supervise students on the band trips and failed to do so when he allowed them to consume alcohol and marijuana. The court explained that even if he was surprised at the proceedings he failed to ask for a continuance. However, a concurring justice cautioned that institutions should be explicit and clearly spell out the charges the faculty member must defend himself against at the termination hearing.[43]

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[40] Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981).

[41] Stastney v. Board of Trustees of Cent. Washington Univ., 647 P.2d 496 (Wash. 1982).

[42] Harris v. Arizona Bd. of Regents, 529 F. Supp. 987 (D. Ariz. 1981).

The board's prerogatives to take action contrary to the recommendation of a hearing committee was another procedural issue before the court. In a Kansas case, two faculty members were dismissed for disruptive activities over an extended period of time. Notice of charges was sent and a hearing was conducted. The hearing committee sent a recommendation not to terminate but the recommendation contained a minority report recommending termination. On review the board of trustees decided to issue a notice of termination. The court ruled that tenure statutes at Kansas public institutions require the board to make the final decision on termination or tenure decisions. The court noted that absent statutory authority, an administrative body performing a quasi judicial function, is not subject to inquiry concerning its mental processes in reaching a decision. The board was within its power to assess the evidence presented at the hearing and the hearing committee report and render a decision contrary to the hearing committee report. This decision did not violate due process.[44]

The final case presented in this section involves a leave of absence. A faculty member who had a one-year leave was offered a teaching position for the next year. He refused the position and elected to remain in graduate school. He never applied for or received approval for an extension of the leave, however, he stayed in communication with the college officials. The circuit court upheld a district court ruling that the timely offer and refusal of a teaching position constituted a "resignation or abandonment" of the faculty member's position removing any property interest requiring due process of terminating employment.[45]

8.2c Awarding Salary Increases

The awarding of salary increases has resulted in several cases in the last year. In an Alabama case an employee charged that due process was required when the university failed to grant a salary increase recommended the previous year by the salary review committee. The circuit court upheld the district court decision that an employee "has no protected property interest in the mere recommendation for a raise." Therefore, due process was not required when the salary raise was denied.[46]

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[43] White v. Board of Trustees of Western Wyoming Commun. College, 648 P.2d 528 (Wyo. 1982).

[44] Kelly v. Kansas City, 648 P.2d 225 (Kan. 1982).

[45] McGhee v. Miller, 680 F.2d 1220 (8th Cir. 1982).

In another case, a retired professor charged that he was discriminated against in the awarding of salary because of speech covered under the first amendment. A jury trial found that the institution was able to show that legitimate reasons such as poor research efforts and not his pronouncements resulted in any salary differential. The circuit court affirmed both the district court and trial court decisions and held that due process hearings were not required when the university failed to give a pay raise.[47]

8.2c(3) Denial of Employee Privileges

When a tenured faculty member is denied certain employee privileges as a disciplinary action, is a property interest implicated? This issue was before the court in a Texas case. A faculty member of the medical school had his clinical privileges removed as a disciplinary action for repeated absence due to his wife's illness. The court found that removal of clinical privileges did not constitute denial of property interest requiring due process, nor was a liberty interest implicated because of an effect on the plaintiff's reputation. However, denial of plaintiff's right to communicate with any of his current patients may have constituted a violation of first amendment freedom of association and speech rights. The case was remanded for discovery and determination on this issue.[48]

8.2c(4) Termination for Financial Exigenices or Program Elimination

Because of the economic situations in many states, institutions in both the public and private sector have had financial exigencies resulting in staff reductions. In the face of reductions in state programs or enrollment decline, some state systems have chosen to simply eliminate whole programs at various institutions. While significant rulings on the procedures required to remove faculty under financial exigency conditions were decided in the seventies, this case law further refines legal problems associated with decisions to reduce higher education costs.

One of these cases which received much publicity involved action by the state of Michigan to implement budget reversions in the state system of higher education. A faculty member at Michigan State

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[46] Doyle v. University of Alabama-Birmingham, 680 F.2d 1323 (8th Cir. 1982).

[47] Berry v. Battey, 666 F.2d 1183 (8th Cir. 1981).

[48] Daly v. Sprague, 675 F.2d 716 (5th Cir. 1982).

University failed an action to stop the university from laying him off for several days, therefore reducing his annual salary because of a financial exigency. The university argued that a contrct to pay a certain amount for services should not be enforced in the face of financial exigencies as a matter of public policy. The Court of Appeals of Michigan found that no authority existed to breach an existing contract because of a financial exigency. Further, the court stated that honoring a binding contract would aid the university in acquiring and holding qualified faculty and such a policy would be in the best interest of the state and would promote sound public policy.[49]

In another case involving the elimination of a program, three tenured faculty received notices of termination of their teaching contracts at the end of the current contract period because the university was eliminating the program within which they taught. Selection of faculty to be terminated within the department was based both on teaching assignments and seniority. The plaintiffs argued that they held a property interest requiring substantive and procedural due process prior to termination. The court held that a bona fide implied right existed to terminate employment due to changes in an academic program. Such termination did not require due process procedures like those when terminating for cause. The fact that the university provided the plaintiffs with an opportunity to receive the rationale for the program change and access to a grievance procedure was sufficient. The court also noted the state system's good faith effort to find other positions within the state system for the terminated faculty.[50]

8.2d Collective Bargaining

At issue under a collective bargaining agreement is what procedures should be followed in denying tenure to a nontenured faculty member. The question in this case was whether access to the grievance procedures is part of required due process. A faculty member who was denied tenure filed for a declaratory judgment and injunctive relief. He claimed that refusal by the grievance committee to hear his case violated his due process rights. The university filed a motion for summary judgment. Upon granting the summary judgment, the court noted that the plaintiff could not simply rely on the fact that tenure was denied and the grievance procedures did not find in his favor, but rather must present genuine issues as to material facts. The merits of a tenure decision were clearly outside the perview of the grievance procedures as stipulated in the collective bargaining agreement.[51]

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[49] Karr v. Board of Trustees of Michigan State Univ., 325 N.W.2d 605 (Mich. Ct. App. 1982).

[50] Jimenez v. Almodovar, 650 F.2d 363 (5th Cir. 1981).

8.3 STUDENTS

In the area of litigation involving students' rights, this has been an active year. Issues involving admission to both undergraduate and graduate programs were before the courts along with the state's right to assess nonresident tuition. Cases involving the federal government's right to collect defaulted loans made their debut along with a claim involving a work study student's continued employment after the total yearly allowable financial award has been reached. The first amendment cases included the uses of student activity fees involving both association and speech rights and the recognition of organizations involved in political advocacy. Questions of students' rights in dismissal were also before the court addressing the issue of counsel's participation in disciplinary hearings and the procedures required for academic dismissal.

8.3a Admission

A United States Supreme Court case decided this year dealt with the denial of admission of a male to an all female institution in Mississippi. The petitioner filed suit alleging his equal protection under the fourteenth amendment had been violated when he was denied full admission to the Nursing School at Mississippi University for Women. His application was rejected solely on the basis of his gender. The university, created in 1884, was and continued to function as an educational institution for women. The university cited this long tradition, the philosophical belief in the benefits of a single sexed institution, and Title IX as a defense against this claim. Title IX expressly allows for institutions with a longstanding tradition of single sex enrollment to continue that tradition.

The district court granted a summary judgment to the university, saying that the plaintiff showed no issue in fact. The Fifth Circuit Court of Appeals reversed, finding that the state failed to show an important governmental objective related to discrimination on the basis of gender. The Supreme Court upheld the circuit court's position. The court held that regardless of Title IX, the Congress does not have the power to authorize state activity which violates the fourteenth amendment. Also, the state failed in its burden of showing that discrimination prohibited under the amendment should be allowed to alleviate existing disadvantage related to the classification, or that the gender-based classification achieved the compensatory objective of one-sexed institutions. The nursing program in opposition to the objective allowed males to audit courses and participate in continuing education and clinical work. Thus, the court found the university's admission policy based on sex to be a violation of the equal protection clause of the fourteenth amendment.[52]

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[51] Kaplan v. Ruggieri, 547 F. Supp. 707 (E.D.N.Y. 1982).

Admission to professional school as an otherwise qualified handicapped individual was at issue in another case decided this year. A woman with severe emotional problems, a long history of repeated self attempts on her life, but an excellent academic record was admitted to medical school. On her application she failed to admit to any emotional problems. She was dismissed from medical school after repeated incidents manifested her psychological problems, and treatment resulted in little improvement. She later attended another university's public health masters program which she successfully completed. She spent seven years in government work at the highest levels of several agencies without recurring psychological problems.

She reapplied for admission to medical school and submitted to a psychiatric examination. The school refused to readmit her because of diagnosis of a continuing psychological problem which stood a high risk of being manifested under the stress of medical school. The plaintiff filed charges through the Office of Civl Rights (OCR), alleging discrimination in admission on the basis of handicap. The OCR found in her favor and attempted to reconcile the case. Failure of reconciliation resulted in a suit in district court. The district court granted her injunctive relief and ordered her admitted. On the merits, the court ruled that she was an otherwise qualified handicapped individual under the Rehabilitation Act of 1973.[53] They reached this opinion by disregarding the findings of OCR and the testimony of experts on emotional disorders and simply evaluating her ability to deal with life's stresses over the last seven years. The Second Circuit on appeal established the order of the shifting burden of proof in cases involving the Rehabilitation Act. First, the plaintiff must establish that she is a handicapped person under the Act and is qualified apart from the handicap. Second, the burden shifts to the institution to show that the handicap was not improperly considered and is relevant to qualifications for the position sought. Third, the burden then shifts to the plaintiff ultimately to show how she is qualified in spite of the handicap and as equally qualified as other applicants admitted. The court found on the facts that the district court erred in not considering expert testimony and that the risk of recurrence of the debilitating emotional disorder was an acceptable reason for refusal of admission. The plaintiff failed to show that she was an otherwise qualified handicapped individual. Summary judgment was issued to the university and the injunctive relief issued by the district court to the plaintiff was vacated.[54]

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[52] Mississippi Univ. for Women v. Hogan, 50 U.S.L.W. 5068 (July 1, 1982).

[53] Leftwich, *supra*, note 25.

8.3b Tuition

In a Supreme Court case, three G-4 aliens sued the University of Maryland for classifying them as nonresident students for tuition. This case had been before the Supreme Court on three other occasions. Initially, the University of Maryland held that a G-4 alien could not be domiciled in Maryland. The Supreme Court affirmed in part a lower court decision and sent the case back to the state court to determine whether aliens could establish domincile in Maryland.[55] In the interim, the University of Maryland changed its defense to one which describes the purpose of the policy as an attempt to differentiate between taxpayers and nontaxpayers in Maryland. On appeal to the Supreme Court, they refused to docket the case and remanded it to the district court to hear new constitutional issues raised by the change in the university's position.[56] On appeal in this opinion, the Supreme Court held that the University of Maryland policy violates the supremacy clause of the United States Constitution. The federal government has the power to regulate aliens and has granted them a tax exemption but permits them to establish domicile. The university policy of barring G-4 domiciled aliens from being classified as in-state students for tuition purposes violates the supremacy clause.[57]

8.3c Financial Aid

8.3c(1) Student Loan Default Collections

The first case in this section deals with right of the federal government to collect a defaulted Guaranteed Student Loan (GSL). The United States brought suit seeking recovery from a student who received the loan. The loan was given in 1968 and came due in 1970. In

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[54] Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981).
[55] Elkins v. Moreno, 435 U.S. 647 (1978).
[56] Toll v. Moreno, 441 U.S. 458 (1979), *per curiam*.
[57] Toll v. Moreno, 50 U.S.L.W. 4880 (1982).

1974 the United States paid the lender's note. In 1979 the United States instituted this action to acquire the principal and interest accrued. The district court held that statutory provisions of federal insured student loan programs gave the United States no right to succeeed to the lender's claim against a student, nor did it give the government the right to direct recovery from the defaulting borrower. The circuit court reversed and remanded the case. It found that the statute gave the United States the right to seek recovery ("indemnification") upon its payment of the lender's claim. The court also held that the statute of limitations on recovery commences on the date of payment of the lender's claim.[58] This ruling on the statute of limitations was followed in another case.[59]

In another default case, a student raised questions about the inadequacy of the program enrolled in as a rationale for default. The United States brought suit seeking recovery from a student who had defaulted on a GSL. The student attended an institution during the 1975-1976 academic year. Repayment on the loan was scheduled for June 1978. In August of the same year, the United States Office of Education wrote the student requesting repayment or notification of any problem which would prevent repayment. The student failed to respond to this correspondence. The lender filed a claim with the Office of Education, the federal guaranty, and received payment on the claim in December of 1978. The student asked the court for a summary judgment claiming that the Office of Education was well aware of the inadequacies at the institution upon which he now bases his defense. The court ruled that the defendant (student) had the responsibility to inform the Office of Education of any defense for nonpayment prior to the processing of the claim and certainly should have responded to the August 1978 letter from the plaintiff. They also noted that the Office of Education had no responsibility of providing the defendant with notice of a hearing prior to payment of the cliam to the lending institution. The United States was entitled to reimbursement from the defendant.[60]

8.3c(2) Work Study Employment

A case was before the federal courts alleging that the institution had violated a student's rights by not allowing him to transfer from the workstudy account to the regular payroll when his workstudy money ran out. The student's employer, a faculty member, had asked him to continue working with his salary paid out of a grant held by the professor. Refusal by the university was based on federal regulations which do not allow a student on financial assistance to exceed the calculated financial need in any one year. The district court issued a summary judgment in favor of the university on all counts. The court ruled that section 1983 could not be applied to a private university where there was no finding of "state action." Secondly, there was no right to private action under the Federal College Work Study Statutes since the statutes dealt with the relationship between a federal agency and a state institution as opposed to the agency and citizens receiving benefits. The court also dismissed a third party beneficiary and civil conspiracy claim.[61]

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[58] United States v. Bellard, 674 F.2d 330 (5th Cir. 1982).

[59] United States v. Frisk, 530 F. Supp. 238 (N.D. Cal. 1980).

[60] United States v. Griffin, 530 F. Supp. 604 (D.D.C. 1982).

8.3d First Amendment

First amendment cases this year involved two issues. The first issue involved the uses of activity fees, in which there were two types of cases. One case concerned funding a group alleged to be political through mandatory activity fees. The other case involved the use of fees to support abortions in the student health care facilities of the institution alleged to violate the free exercise of religion. The second issue dealt with the recognition of organizations and the freedoms of speech and assembly.

8.3d(1) Uses of Activity Fees

In a New Jersey case, students questioned a fee collection procedure used to fund a group called Public Interest Research Group (PIRG). PIRG is involved in both political activities and educational activities. The university set up a separate but mandatory fee collection process with an accompanying refund card for those who objected to the political activities of the organization. The students in this claim alleged that such a procedure violated their first amendment rights. The district court issued a summary judgment to the university, finding that the refund policy made the mandatory fee constitutional.

The Third Circuit Court of Appeals reversing and remanding, applied the standard of *Abood v. Detroit Board of Education.*[62] The *Abood* case states that service fees used in part for political advocacy could only be extracted from those agreeing with the political advocacy. Therefore, the circuit court remanded the case to the district court to allow the plaintiffs to establish the extent to which PIRG is essentially a political action group as opposed to an organization existing for educational purposes. Also, the university should be allowed to challenge the plaintiff's position or show a compelling state interest in the sponsorship of the organization. The court ruled that the refund mechanism was not enough to blunt an alleged first amendment violation.[63]

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[61] Murphy v. Villanova Univ., 547 F. Supp. 512 (E.D. Pa. 1982).

[62] 431 U.S. 209 (1977).

In another case, students claimed a violation of the free exercise clause because part of student fees were used to fund abortions and abortion counseling at the student health center. They asked the university to pro rate their fees to exclude that part of the fees which was used to pay for abortion activities. The students filing the claim opposed abortions on religious grounds. The appeals court held that the activity fees in this case were like taxes. The university has the right to levy a fee for general student support services. A constitutional right is not violated because individual students object on religious grounds to some of the services provided. Therefore, like taxes, all students must pay the fees regardless of religious affiliation.[64]

8.3d(2) Recognition of Organizations

In one case, a state statute concerning withdrawal of state funding because of recognition of certain organizations was challenged on constitutional grounds. In this Florida case, a community college trustee filed suit alleging that a Florida statute violates the first amendment to the Constitution and the Florida constitution. The statute removed state funding from any institution which recognized an organization whose purpose was to advocate sexual activity between unmarried individuals, in violation of an individual's freedom of speech. The Supreme Court of Florida held that the trustee, while not having "standing" in his official capacity, could bring a suit as a private citizen. The court held that the statute violated freedom of speech under the first amendment to the United States Constitution. The court also found that the Florida constitution article III section 12 was violated in that the statute was "not directly and rationally related to appropriations of state funds" but rather would achieve some other legislative objective unrelated to funding.[65]

Another case involves recognition of organizations. The Gay Student Alliance brought suit alleging that failure of the university to recognize their organization after it has met all requirements violated their rights under the first amendment's freedoms of speech and assembly. The university based its defense on the disruptive nature of the organization and that the organization may have promoted and participated in activities which violated Oklahoma law. The Supreme Court of Oklahoma ruled that first amendment rights had been violated in refusal to recognize this organization. Failing to show written documents or evidence of activity which violated Oklahoma law, the state could not rely on the mere suspicion that some members would violate the laws of the state. The key issue noted by the court was whether the state, after the organization had met all requirements, could deny recognition based on the "content of messages espoused by the organization." They found that the first amendment clearly protected those who peaceably promoted the repeal of a criminal statute. The court, however, refused to award damages to the plaintiffs, finding that the board members neither knowingly violated the constitution nor held a malicious intent, but rather acted in what appeared to them to be the best interests of the university.[66] This case follows several other recent cases concerning recognition of organizations.[67]

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[63] Galda v. Bloustein, 686 F.2d 159 (3rd Cir. 1982).

[64] Erzinger v. Regents of the Univ. of California, 185 Cal. Rptr. 791 (Cal. Dist. Ct. 1982).

[65] Department of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1981).

8.3e Dismissal

8.3e(1) Disciplinary Dismissal

The question of procedures required in dismissal of students for cause related to nonacademic conduct at public institutions is well established. Periodically, cases come along which further clarify the extent of these due process requirements. A case this year deals with the issues of the participation of legal counsel in the hearing process and the student's ability to compel witnesses to testify.

A student suspended for discipline violations for one semester brought suit alleging violations of procedural due process. The student missed two prehearing conferences as provided in the institution's bylaws due to an error in his mailing address. He received a notice of the charges against him, a hearing was held, and legal counsel was present. However, legal counsel was only allowed to participate in a limited way. He was allowed to assist and advise the student and to participate in part in the hearing as per the institution's bylaws. The district court held that failure to hold the prehearing conference did not in any way violate the rudiments of due process. The institution's procedures were clearly adequate to protect the constitutional rights of the student. The limitations placed on legal counsel's participation and the fact that the student could not compel witnesses to attend the hearing in no way compromised due process in this situation.[68]

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[66] Gay Activist Alliance v. Board of Regents of the Univ. of Oklahoma, 638 P.2d 1116 (Okla. 1981).

[67] *See* Healy v. James, 408 U.S. 169 (1972); Gay Alliance of Students v. Mathews, 544 F.2d 162 (4th Cir. 1976); Gay Student Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974); and Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977).

8.3e(2) Academic Dismissal

The question of procedures required in academic dismissal was addressed by the United States Supreme Court in *Horowitz v. Board of Curators of the University of Missouri.*[69] However, challenges continue to result in litigation. In the past year, at least six cases have been reported which dealt with academic dismissal.

One case dealt with the question of gender discrimination in the assignment of grades. The plaintiff alleged that her academic dismissal was the result of sex discrimination in the assignment of grades. She filed her claim under Title IX. The First Circuit Court of Appeals failed to reach the merits of the case, finding the receipt of workstudy money not enough to implicate the institution as a program receiving federal financial assistance within Title IX.[70]

In another case a medical student failed to complete in a timely manner the requirements of a clincial course. The student offered no substantial reasons to merit an incomplete instead of an "F". One "F" results in dismissl from medical school. The student charged that the decision to give him a failing grade was arbitrary and capricious and violated his substantive due process. The circuit court citing *Horowitz* and other cases discussed the need for courts to give deference to academicians in academic questions. There were no substantial facts to establish that the grade was assigned in an arbitrary and capricious manner, but rather based on a reasoned evaluation of the student's performance. The court stated that the medical school, not the federal courts, should evaluate and determine the performance of a medical student.[71] Three state court cases came to the same conclusion about academic dismissal and the assignment of grades.[72]

The final case in this section dealt not only with academic dismissal, but also with the academic aid required when admitting disadvantaged students. A minority law student was dismissed from law school after repeating his first year and failing to raise his grade point above the minimum. As a special admittee, he was not only allowed to repeat the first year, but in calculating his grade point average was allowed to repeat the first year, but in calculating his grade point average was allowed to drop the lower grades in all courses taken a second time. The student filed suit, charging a breach of contract, arbitrary and capricious action, and discrimination.

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[68] Turof v. Kibbee, 527 F. Supp. 880 (E.D.N.Y. 1981).

[69] 435 U.S. 78 (1978).

[70] Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981).

[71] Hines v. Rinker, 667 F.2d 699 (8th Cir. 1981).

[72] *See* Patti Ann H. v. New York Medical College, 453 N.Y.S.2d 196 (N.Y. 1982); Neel v. I.U. Bd. of Trustees, 435 N.E.2d 607 (Ind. Ct. App. 1982); and *In re* Levy, 450 N.Y.S.2d 574 (1982).

The lower court had granted a summary judgment to the university on all three charges. The appellate court affirmed the lower court decision. First, they found no breach of contract when a specific type of academic aid was not offered while other types of aid had been given. Nor did the school have to change its policy of not rounding off grade point averages. Second, they found no arbitrary or capricious action, but rather a decision based on sound academic standards. Finally, they found that rather than being discriminated against, the plaintiff in fact received special treatment not given to all students but only to those classified as disadvantaged.[73]

8.4 LIABILITY

Questions of the institution's liability continue to come before the courts. These issues take number of forms. The first is in the area of personal injury. Second is whether college athletes on scholarship qualify for workmen's compensation if disabled while playing or practicing. The third area deals with the institution's liability to an injured employee of a company providing services under a contract with the institution. The final area deals with the question of misrepresentations in the institution's publications.

8.4a Personal Injury

In the first case, a number of the school's intercollegiate softball team was struck in the eye by a softball. She was sent to her dorm room by the coaches and told it would be all right. She subsequently lost sight in that eye as a result of the injury. Medical experts testified that immediate medical attention in this type of injury results in a 90 percent recovery rate. The student charged in her suit that the coaches failed to provide medical assistance. The district court found that the institution had a responsibility to provide immediate medical assistance in this type of injury and had breached that duty. The circuit court upheld the decision, but either reduced the damage award or allowed a retrial to settle the question of the amount of the damage award.[74]

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[73] Marquez v. University of Washington, 648 P.2d 94 (Wash. Ct. App. 1982).

[74] Stineman v. Fontbonne College, 664 F.2d 1083 (8th Cir. 1982).

In another case, a student, as part of a course, was required to participate in a play. In his role, he was to fall down while holding a glass when a crutch was pulled out from under his arm by another actor. The student fell and a large piece of borken glass severed nerves and tendons in his hand. He filed suit, claiming personal injury as a result of the inappropriate use of a real glass as opposed to a substitute glass normally used in theatrical productions. The district court issued a summary judgment to the university, finding that the glass was not defective and that the Texas Tort Claims Act[75] does not allow a person to question the policy decisions of a state employee, *i.e.*, the selection of a real glass as opposed to a theatrical prop by the professor and director of the play. The circuit court found that the Texas Tort Claims Act concerns "discretionary matters" of governmental policies of the executive and legislative branches of government. The government is liable for "negligent exercise of discretion" by government officials where it is outside the above exclusion. The selection of the glass was not a governmental policy decision and, therefore, the case was remanded for trial.[76]

8.4b Workmen's Compensation

A varsity football player, while under a financial aid agreement with the university, was injured during spring football practice and rendered a quadriplegic. The financial aid agreement offered the student free tuition, room and board, laboratory fees, book allowance, and other benefits in exchange for his services on the varsity football team. This aid would continue during injuries suffered while playing football for the school. The student filed a claim under the state Workmen's Compensation Act[77] before the industrial board hearing member, seeking recovery for a permanent total disability and medical expenses. The industrial board ruled that no employer-employee relationship existed and that he was not qualified for workmen's compensation. The court of appeals reversed the industrial board decision, finding that the agreement between the student and the university was a contract within the meaning of the Workmen's Compensation Act. The trustees of the university held a contract with the student to play football for the institution in exchange for financial aid. They also found that this employment was not temporary, but of a somewhat permanent duration. The case was remanded to the industrial board to determine the amount of compensation.[78]

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[75] TEX. REV. STAT. art. 6252-19 (Vernon).

[76] Christilles v. Southwest Texas State Univ., 639 S.W.2d 38 (1982).

[77] IND. CODE § 22-3-1-1.

[78] Rensiny v. Indiana State Univ., 437 N.E.2d 78 (Ind. Ct. App. 1982).

8.4c Contractor's Employee Injury

This section deals with the liability of the institution when a contractor's employee is injured. In a case involving Wake Forest University, an employee for the food service contractor was injured when a cash register table provided by the university fell on her foot. The appeals court found that the university had a responsibility to a cafeteria worker employed by an independent contractor with the university. Since the food service company was an independent contractor with the university rather than a lessee, the contractor's employee was an "invitee" of the university. Therefore, the university had a duty to exhibit due care under all circumstances and a jury should determine whether the university was negligent in this matter.[79]

8.4d Misrepresentation

A student brought charges that a medical school falsely represented the holdings of its library, equipment provided in laboratories, the sequencing of classes, and the number of current faculty. He also charged that a photograph in the bulletin of a nearby hospital implied access to its clinical facilities when in fact that was not the case. To substantiate these charges, the student was required to meet four criteria: (1) misrepresentation, concealment, or nondisclosure of facts had to be present; (2) the plaintiff had to prove intent to deceive on the part of the defendant; (3) he had to show that he was justified in relying on the misrepresentation; and (4) his reliance resulted in injury to him. The court found the student was able to meet all four criteria on all of the alleged misrepresentations. The court found that the institution's failure to "disclose detrimental changes" in their facilities as represented in the school bulletin was concealment. They also found the school to be involved in "scienter," an element in fraud, by falsely representing the facilities and programs through information known to be untrue. Damages were awarded the student in the form of tuition and fee costs, air fare, and interest on said moneys.[80]

8.5 ANTITRUST

The issue under antitrust deals with the question of the National Collegiate Athletic Association's (NCAA) right to control the telecasting of collegiate football games under the guidelines of the Sherman Antitrust

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[79] Aarhus v. Wake Forest Univ., 291 S.E.2d 837 (N.C. Ct. App. 1982).

[80] Idress v. American Univ. of the Carribean, 546 F. Supp. 1342 (S.D.N.Y. 1982).

Act.[81] The plaintiff in this case, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association, alleged that the NCAA control of the televising of college football games violated the Sherman Antitrust Act. The court found that the NCAA was involved in price fixing and restricted output, that its controls constituted a group boycott, that it controlled the market of televised college football games, and, therefore, was subject to an injunction under the Clayton Act. The court found it clear that the NCAA exercised monopoly power and granted the following relief. The current contracts negotiated between the NCAA and ABC, CBS and TBS television networks should be illegal and unenforceable. Further, the NCAA should be enjoined from enforcing the provisions of future contracts, acting as the exclusive bargaining agent for the sale of telecast rights and that membership in the NCAA did not give the NCAA the right to control a member institution's telecast rights.[82]

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81. 15 U.S.C. §§ 1-2 (1980).

82. Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982).

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